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A RATIONALE OF GIFTS AND FAVOURS

Doctor: But what opinion hold they that be learned in the law of England in such promises that be called naked or nude promises? . . .

Student: The books of law of England entreat little thereof, for it is left to the determination of doctors; and therefore I pray thee shew me somewhat now of thy mind therein, and then I shall shew thee somewhat therein of the minds of divers that be learned in the law of the realm.

Christopher St. Germain. (1530)

WHILE people constantly make or promise gifts and do and promise favours, these benevolent activities have no official rubric in English law. English law, so runs the classical explanation, will not enforce a gratuitous promise not made by deed; nor will it disturb an executed benefaction however ungrateful the beneficiary may be.[1] Nonetheless it simply is not true that even informal gratuitous arrangements have never been given positive legal treatment. What is true is that, rather than open and direct, this treatment has been *ad hoc* and sporadic, and peculiarly involved within more prominent fields of legal commerce. One such involvement has been with the law of contract and consideration; another with trusts and other equitable doctrines; a further liaison has long existed with bailment and the law of agency; and a significant link can also be discovered with the tort of misrepresentation. Thus on the periphery of traditional doctrine, a surreptitious law of gifts has led a precarious as well as promiscuous existence. We therefore need to reconsider a wide range of situations to assess their practical results and to

[1] These propositions are so firmly established that authority is hardly required; but see, *e.g.*, Jenks' *English Civil Law* (4th ed., 1947) 80. Nor is the legal justification for these rules anywhere clearly given, though it is to some extent implicit: since gifts and favours are purely private and sentimental arrangements, no useful purpose would be served by legal intervention. See generally Fuller, *Consideration and Form* (1941) 41 Col.L.R. 799 at 813 and *passim*.

promote their integration.[2] In the end we shall arrive at a truer picture of how the law has treated executory and executed gifts and how it treats favours.

Methods of Enforcing Gratuitous Promises

We must, as a first step, renew acquaintance with *Shadwell* v. *Shadwell*,[3] even though it is a notoriously well-known decision. An affectionate uncle promised an annuity to his nephew, who was a young barrister engaged to be married. The uncle wanted to assist him "at starting," but after the nephew's marriage not all the annuities were paid. The straightforward issue was whether or not this promise of financial help was enforceable; and looking at the facts without legal pre-conceptions, it is clear that this was a gift-situation of a very typical kind. There was here no element of bargain, no sly calculation to procure a marriage [4]: the promise was just "an act of kindness," [5] a "mere voluntary courtesy," [6] an avuncular gesture of not infrequent happening. With less goodwill the uncle could equally have said, "I will give you £500 if you break your leg." [7] The broken leg, like the previous marriage, were not meant as an inducement or incentive; they were meant as the occasion or condition for the payment of the gratuity. In other words, there was here no room for "consideration," if consideration is taken in its primary sense that differentiates gifts from bargains. Yet to make the uncle's promise enforceable, within the law of contract, a valuable consideration had to be found. This the court did find in an ingenious manner. First, the nephew was said to have suffered a detriment, for he "made the most material changes in his position, . . . and may have incurred pecuniary liabilities resulting in embarrassments which would be in every sense a loss if the income that had been promised should be withheld" [8]; secondly,

[2] For a similar attempt, see Shattuck, *Gratuitous Promises—A new Writ?* (1937) 35 Michigan L.R. 908. Although I have learned greatly from this paper, my own analysis and conclusions are substantially different. Especially have I tried to drive home a moral where Shattuck remained rather inconclusive.

[3] (1860) 9 C.B.(N.S.) 159; for fuller discussion see Cheshire and Fifoot, *Law of Contract* (3rd ed., 1952) 79 *et seq.*; A. G. Davis, *Promises to Perform an Existing Duty* (1937) 6 Camb.L.J. 203. See also Corbin, *Does a Pre-Existing Duty Defeat Consideration?* (1918) 17 Yale L.J. 362, Selected Read. 504.

[4] See note 8, *infra*.

[5] See argument of counsel, (1860) 9 C.B. at 171.

[6] *Cf. Lampleigh* v. *Brathwait* (1615) Hob. 105.

[7] As pointed out by Byles J. (1860) 9 C.B. at 177; and see on this the pregnant remarks in Holmes, *The Common Law* (1881) 292–293.

[8] *Per* Erle C.J. (and Keating J.) (1860) 9 C.B. at 174. In the next line the learned judges make the additional suggestion that the uncle's promise was perhaps made "to induce the parties to marry," so that the "promise so made would be in legal effect a request to marry." But if this was so, there would have been no difficulty to find consideration since acts performed upon request have always been enforceable more or less as bargains: *Lampleigh* v. *Brathwait* (1615) Hob. 105; 1 Sm.L.C. 148, 151 *et seq.*

the uncle was attributed a benefit in view of "the relation in which the parties stood and the interest in the settlement of his nephew which the uncle declares. The marriage primarily affects the parties thereto; but in a secondary degree it may be an object of interest to a near relative, and in that sense a benefit to him."[9] This is not the place to dwell on the curious manipulation of detriment and benefit,[10] nor on other difficulties other writers have dealt with at length.[11] What is important to appreciate, however, is that the common law was prepared to clothe a gift with the vestments of bargain to fill the gaps of *nudum pactum*.[12]

Meanwhile, equity had achieved similar results by by-passing, instead of following, the law. *Bold* v. *Hutchinson*[13] not only reads like a Victorian novel, but also exemplifies a small group of impressive cases to which too little attention has been paid. When the Reverend Hugh Bold proposed to Theodosia Hutchinson, her father assured him that Theodosia would, at the death of her parents, have "not less than £10,000." The eventual share fell short of that figure, and it was held that the deficiency had to be made good by the father or by his estate. "The principle (said Romilly M.R.[14]) is this: that where, upon the marriage of two persons, a third party makes a representation upon the faith of which that marriage takes place, he shall be bound to make good that representation."[15] There was no suggestion that the father had deceived or misled the parson; Bold came to ask for the father's consent, and the latter added to his blessings a large pecuniary benefaction. Nor had Bold changed his position for the

[9] (1860) 9 C.B. at 174.

[10] Yet as Holmes said: "It is hard to see the propriety of erecting any detriment which an instrument may disclose or provide for, into a consideration unless the parties have dealt with it on that footing." *The Common Law* (1881) 292. If consideration is (in Pollock's apt definition) the *price* paid for a promise or is the requested or bargained-for exchange (see 1 Williston, *Contract* (rev. ed., 1936) §§ 99–100), Lancey Shadwell surely paid no price by getting married.

[11] See note 3, *supra*.

[12] The decision in Shadwell also served as a "point of departure and a method of approach" for Cardozo J.'s famous judgment in *De Cicco* v. *Schweizer* (1917) 221 N.Y. 431; 117 N.E. 807. A father promised his prospective son-in-law to pay an annuity to his daughter after marriage. The father paid the annuities for ten years and then stopped. It was held by the N.Y. Court of Appeals that the promise was enforceable. For a splendid discussion of this case, see Corbin, *Mr. Justice Cardozo and the Law of Contracts* (1939) 39 Col.L.R. 56 at 60; 52 Harv.L.R. 408 at 412; 48 Yale L.J. 426 at 430; and compare this with Corbin's earlier article (1918) 27 Yale L.J. 362.

[13] (1855) 20 Beav. 250. On appeal, (1855) 5 De G.M. & G. 558, the case was mainly concerned with rectification.

[14] (1855) 20 Beav. at 256.

[15] There was some authority for this decision: *Montefiori* v. *Montefiori* (1762) 1 W.Blackst. 363 and *De Biel* v. *Thomson* (1841) 3 Beav. 469, *sub nom.* *Hammersley* v. *De Biel* (1845) 12 Cl. & Fin. 45. *Bold* v. *Hutchinson*, and the precedents on which it is based, are sometimes taken as examples of equitable estoppel, but the decisions are based not on estoppel as a form of defence but on misrepresentation as a means of attack. For another way of utilising the concept of misrepresentation, see text at note 11, p. 246, *infra*.

worse, unless it was contended that Theodosia was insufferable for anything less than £10,000. Furthermore, and this is the most interesting point, the father's statement was dealt with as a misrepresentation. Sir John Romilly was completely aware that this statement was in fact a promise,[16] yet because of the established nullity of the gratuitous promise, the concept of (mis) representation remained the only available method of approach. Nevertheless once such a paternal promise became enforceable, even the *alias* of representation was quietly shed. As Romilly M.R. put it in a subsequent case: "It is of great importance that all persons should understand that when a man makes a solemn engagement upon an important occasion, such as the marriage of his daughter, he is bound by the promise he then makes."[17]

For a more direct approach to promised gifts we must turn to the celebrated section 90 in the *Restatement of Contracts*: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[18] This section embodies a doctrine otherwise known as "promissory estoppel," and its purpose is to cover donative promises such as this: A promises B that if B will go to college and complete his course he will give him (say) £1,000; B goes to college and nearly completes his course; A can no longer revoke his promise.[19] On the other hand, if A promises B £1,000 knowing that B wants that money for the purchase of land and B then secures an option, A may still withdraw his promise.[20]

But the *Restatement* here invites some critical remarks. Why, in particular, is the college-promise enforceable though not the promise to assist B in the purchase of the land? Is it that A cannot reasonably expect B to secure an option, but can expect him to go to college? Or is injustice unavoidable if B nearly completes his course, but is avoidable if B merely stands to lose an option? It is obvious that section 90 suffers from a central defect, for (apart from its vague appeal to justice) it furnishes not even an approximate standard for classifying what are irrevocable gratuitous promises and what are not; indeed, the distinction between the college-promise and the promise to help the purchase of land seems completely arbitrary and unexplained exactly where

[16] See, for example, the same judge's remarks in *Jameson* v. *Stein* (1855) 21 Beav. 5 at 10, referring to "one of the most valuable principles which this court administers, of compelling a man to make good his words."

[17] *Laver* v. *Field* (1862) 32 Beav. 1 at 12. But the idea of misrepresentation persisted: thus in *Coverdale* v. *Eastwood* (1872) L.R. 15 Eq. 121 at 131 we find the remarkable statement that "representations of this kind will constitute a contract."

[18] See also 1 Williston, *op. cit.*, §§ 139–140; 1 Corbin, *Contracts* (1950) § 204.

[19] See *Restatement of Contracts*, § 90. Illustration 3.

[20] *Ibid.*, Illustration 4.

a rational distinction is required.[1] Yet despite these criticisms, section 90 has one great advantage: it is the first frank recognition in Anglo-American law that, at least *some* gratuitous promises are enforceable, *i.e.*, enforceable in their own right as gifts and not as artificial or simulated bargains. The section is thus also a distinct advance on what in England goes by the name of "equitable estoppel"[2]; for the latter, notwithstanding recent extensions, still remains unnecessarily cramping and essentially confused.[3]

Another American contribution needs brief mention. If you promise a donation to a charitable body, this is so apparent a gift-promise ("without consideration") that English courts have consistently refused enforcement except where the promise is by covenant, *i.e.*, is signed, sealed and delivered.[4] But in the United States, even simple charitable promises have, since the early nineteenth century, been given growing legal protection.[5] The judicial reasons for this have, however, varied widely. In the majority of cases, the courts enforced the promise because the charity had incurred liabilities in reliance on the offered contribution; and it is, incidentally, this type of case which gave inevitable stimulus to the doctrine of promissory estoppel. In a second group, the courts implied a counter-promise (and therewith "consideration") that the charity would use the donation in a way designed to memorialise the donor.[6] In only a small minority of decisions did the courts explicitly admit their true reason for intervention, namely, the fact that charities depend on such gifts for their very existence.[7] Since in America, much more than in England, a large segment of religious, educational and scientific activity rests on a voluntary "foundation," a compelling social necessity pushed towards the enforcement of this kind of gratuitous promise. The American development affords an excellent illustration of how important social needs make way for new rights and

1 It is most curious that the English position seems to be reverse: while English law would not at present enforce the "college-promise," it does enforce the promise to help the purchase: see *Crosbie* v. *McDoual* (1806) 13 Ves. 148 and text at note 14, p. 247, *infra*.

2 For a brief but very adequate account, see Cheshire and Fifoot, *op. cit.*, 75 *et seq.* *Cf.* also Spencer Bower, *Estoppel by Representation* (1923) 15 *et seq.*, 351 *et seq.*; Everest & Strode, *Law of Estoppel* (3rd ed. 1923) 236 *et seq.*

3 *Cf.* Wilson, *Recent Developments in Estoppel* (1951) 67 L.Q.R. 330; Denning, *Recent Developments in the Doctrine of Consideration* (1952) 15 M.L.R. 1, Sheridan, *Equitable Estoppel Today* (1952) 15 M.L.R. 325.

4 The leading cases are *Re Hudson* (1885) 54 L.J.Ch. 811 and *Re Churchill* [1917] 1 Ch. 206.

5 See Billig, *The Problem of Consideration in Charitable Subscriptions* (1927) 12 Cornell L.Q. 467, Selected Read. 542; Carver, *Consideration in Charitable Subscriptions* (1928) 13 Cornell L.Q. 270, Sel.Read. 559.

6 The best example is *Allegheny College* v. *National Chautauqua County Bank of Jameston* (1927) 246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980; and see Kessler and Sharp, *Contracts: Cases and Materials* (1953) 237 and *passim*.

7 See Billig, *loc. cit.* at 558–559.

remedies, needs which in another day and age may have been thought as outside legal sanction.

We return to consider traditional equitable ways of making executory gifts; and first as to the declaration of a trust.[8] The law is that where A expressly declares that he holds property in trust for B, a trust is completely constituted with two precise effects: A's declaration becomes irrevocable and, concomitantly, B can claim specific execution of the gift. But the troublesome question is what words will be construed as an irrevocable declaration. For example, in *Jones* v. *Lock*[9] a father put a cheque into the hands of his nine-month-old son, repeatedly saying that he gave the money to "baby for himself." These expressions were held to be not a definite intention to give but as nothing more than loose conversation. This decision unfortunately restricted and obscured the scope of trust-declarations, for (presumably) the father should have said "I am trustee, etc." [10] or used words equally formalistic.[11] As a result of this, even Maitland thought that there was some real difference between a man (i) promising to give and (ii) assuming trusteeship for another. The former "means to get rid of his rights," the other "intends to retain his rights but to come under an onerous obligation." The latter intention is far rarer than the former. Men often mean to give things to their kinsfolk, they do not often mean to constitute themselves trustees." [12] But there is here some confusion. While it is true that nobody easily undertakes onerous duties for another, the burdens now envisaged are not those imposed by the usual trust. For once the nature of a declared trust is properly perceived, it will be seen that this is not a trust by way of settlement, but merely a device for giving a donee a specific claim against a donor. Nor is it plausible that a donor has significantly different intentions when, *e.g.*, a father says to his son "I hereby promise to give you Blackacre when you grow up," or says "I hereby become trustee for you of Blackacre until you grow up." In both cases, the father has to retain Blackacre for the time being; in both cases he means to get rid of his rights only at some time in the future. The only difference between a promise to give and

[8] *Cf.* Keeton, *Law of Trusts* (6th ed. 1954) 78; Snell's *Principles of Equity* (24th ed. 1954) 108 *et seq.*; Hanbury, *Modern Equity* (5th ed. 1949) 142 *et seq.*; Vaines, *Personal Property* (1954) 196 *et seq.*

[9] (1865) L.R. 1 Ch. 25; and see also *Richards* v. *Delbridge* (1874) L.R. 18 Eq. 11.

[10] *Cf.* Hanbury, *op. cit.* 143.

[11] This verbal formalism also overlooks the possibility of the precatory trust. It is true that the precatory trust is usually testamentary; but there is no reason why the three operative criteria of donative intention (*i.e.*, certainty of words combined with the certainty of objects and subject-matter) should not apply to donations *inter vivos*. Perhaps *Cochrane* v. *Moore* (1890) 26 Q.B.D. 57 esp. at 73 may qualify as an illustration of a non-testamentary precatory trust.

[12] *Equity* (Brunyate ed. 1949) 72.

a declaration of a trust is therefore purely accidental and verbal, with different words expressing essentially the same intention.

There is, however, another side to this "declared" or promised gift where actual delivery is postponed until some time in the future. Consider, for example, a father's case in which his circumstances so completely change that he is hardly in a position to fulfil his original benevolent intention. Are we to keep him sternly to his promise, applying to him the same strict principles of impossibility of performance which obtain in commercial contracts? The mere suggestion of this seems too harsh to be seriously entertained [13]; and it is perhaps just this more indulgent attitude to benevolent commitments (as compared with the stricter attitude to ordinary bargains) which may explain our disinclination to construe too easily donative expressions as firm donative intentions.[14] In other words, rather than mould a new law of impossibility of performance more appropriate to gifts, the courts simply denied original gift-intentions unless formally expressed. This was certainly the easier solution, but its legacy has been the artificial distinction between "promises" and "declarations."

There remains a better instance of the trust as gift-machinery. Take the case not of a direct promise by A to B, but of a covenant or promise whereby A agrees with third parties, usually the trustees, to make a gift or (what is the same thing) to settle property on B. This is an incompletely constituted trust, since the settlor has not conveyed the property to the trustees, but has merely promised to convey or give.[15] The well-known rule is that the intended beneficiary cannot, without valuable consideration, enforce A's promised gift, for equity neither assists a volunteer nor will it perfect an incomplete gift.[16] Moreover, had equity strictly followed the law on what is valuable consideration, the relationship between A and B could never have amounted to more than a contract of sale—a relationship that would have had no new practical importance except for the curious interposition of trustees. But the interesting feature of the incompletely constituted trust is that equity extended the scope of consideration to include the so-called marriage-consideration. Thus if A is about

13 Professor Havighurst has well made this point: thus a man suffering severe financial loss "may still be regarded as morally bound to pay his grocer, but under no duty, ethically speaking, to fulfil a pledge to his alma mater," *Consideration, Ethics and Administration* (1942) 42 Col.L.R. 1 at 12.

14 In *Jones* v. *Lock* (1865) L.R. 1 Ch. 25 at 29, Lord Cranworth L.C. argued that the donor "would have been very much surprised if he had been told that he had parted with the £900, and could no longer dispose of it." But in view of the father's definite expressions, this surprise seems somewhat imaginary. It may, however, be true to say that the father would have thought it legitimate to keep the money if his financial condition had seriously worsened; and this is perhaps the "surprise" the court tried to articulate. But no setback or surprise arose in this case, the father having died without however having formalised the gift.

15 See Keeton, *op. cit.* 79 *et seq.*; Snell, *op. cit.* 106; Hanbury, *op. cit.* 142.

16 Hanbury, *op. cit.* 139 *et seq.*

to marry B and promises to settle property on B and their issue, not only the spouse can enforce the promised gift but also their legitimate offspring.[17] This right given to children, who at the time of the gift are non-existing promisees, looks particularly odd. For suppose another situation where a father, long after marriage, covenants to give property for the support and maintenance (say) of his grown-up daughters.[18] Because the father's promise is not now made in consideration of marriage, the daughters will be volunteers and outside equitable assistance. But judged solely by merit, there is no justification why a gift to unborn promisees should have more claim to enforcement than a promise to endow living children. In fact, the comparative results seem not only absurd but shockingly distorted. What then is the genesis of these results? The answer is that, through a process of fragmentary logic, equity took as its model of marriage-consideration the rules worked out for fraudulent settlements.[19] As regards these, restrictive rules were necessary and appropriate to protect the interests of creditors or subsequent purchasers.[20] However, these rules lost both reason and relevance when applied to different situations where no fraud and third parties were involved. It is an historical accident and misfortune that equity did not adopt for the incompletely constituted trust the same concept of good or meritorious consideration evolved for the presumption of advancement in connection with resulting trusts.

Apart from trusts, equity created two additional methods for enforcing gift-promises. One consists in an infrequent application of the remedy of specific performance, exemplified by *Dillwyn* v. *Llewellyn*.[1] A father, wanting his son to live in his immediate neighbourhood, gave him a small estate to enable the son to build a residence thereon. He reiterated this gift in a written memorandum, but did not execute a conveyance. The son went into possession and spent a considerable sum on the erection of a house. When the father died, it was found that he had left

[17] *Cf. Re Plumptre's Marriage Settlement* [1910] 1 Ch. 609.

[18] Compare *Jeffries* v. *Jeffries* (1841) Cr. & Ph. 138.

[19] See, in particular, *Colvile* v. *Parker* (1607) Cr.Jac. 158; *Evelyn* v. *Templar* (1787) 2 Bro.C.C. 148; *Mathews* v. *Feaver* (1786) 1 Cox Eq.C. 278; *Buckle* v. *Mitchell* (1812) 18 Ves. 100; *Dillon* v. *Coppin* (1839) 4 My. & Cr. 647; *De Mestre* v. *West* [1891] A.C. 264. See generally, Sugden, *Vendors and Purchasers* (14th ed. 1862) 714 *et seq.*; May, *Fraudulent and Voluntary Dispositions of Property* (2nd ed. 1882) 243 *et seq.* A good chance of reversing this development was lost in *Dillon* v. *Coppin*, *supra*, when it overruled *Ellis* v. *Nimmo* (1835) L. & G.Rep.t.Sug. 333 (an Irish case in which a post-nuptial agreement was specifically performed because of meritorious consideration).

[20] Although creditors and purchasers came under different statutory provisions (13 Eliz. c. 5 and 27 Eliz. c. 4) the meaning of "voluntary" was much the same: May, *op. cit.* 244.

[1] (1862) 4 De G. F. & J. 517. It deserves to be pointed out that this method by specific performance is, in fact, indistinguishable from the declaration of a trust. For both methods perform here precisely the same function, giving the donee a specific claim against the donor.

the property to trustees, not to the son; and the son now claimed conveyance of the freehold. While recognising the gratuitous nature of the father's promise, Lord Westbury L.C. argued that "the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift."[2] The subsequent acts were the "expenditure by the son, with the approbation by the father, [which] supplied a valuable consideration originally wanting."[3] So what began as a clear case of gift is again (as in *Shadwell* v. *Shadwell*[4]) transformed into a valuable contract. One cannot but deplore these patent artificialities, even if they are the inevitable product of the consideration-doctrine.[5] But the practical result is clear: a parental gift-promise will be specifically enforced, if followed by the promisee's entry and his expenditure and improvements.[6]

The other equitable method, achieving similar results, is the equitable licence. This has undergone great developments of late, although its importance for the law of gifts has not generally been noticed.[7] In the most outstanding recent case,[8] a father wanted to provide a home for son and daughter-in-law. He bought a house for £750, paying £250 in cash and borrowing £500 from a building society. He allowed the young couple to go into possession, further orally promising them complete legal ownership provided they regularly paid off the mortgage. These simple facts greatly puzzled the court as to what was the legal relationship between the parties[9]: had the couple a right to remain while repaying the loan, or could they, not being rent-paying tenants, be summarily evicted? It was held that the promisees, having acted on the promise, became equitable licensees with an irrevocable right of occupation so long as they made the repayments. Never before had the licence been used to protect such gratuitous family arrangements; it is odder still that the court should have extended the scope of the equitable licence to protect (perhaps

[2] At 521.

[3] At 522.

[4] (1860) 9 C.B.(N.S.) 159.

[5] This is not to imply that "consideration" should be abolished. Rather would the argument be that consideration is entirely misplaced in the context of gifts, simply because its function is to delimit regular bargains. In manipulating consideration equity has been the worst offender, torturing and extending it beyond recognition. For an account, see Pound, *Consideration in Equity* (1918) 13 Illin.L.R. 667; Pound, *Introduction to the Philosophy of Law* (1922) 258–259; and see Shattuck, *loc. cit.* 919–924.

[6] *Dillwyn* v. *Llewellyn* is sometimes taken as an illustration of equitable estoppel by acquiescence: see Cheshire, *A New Equitable Interest in Land* (1953) 16 M.L.R. 1 at 5; Spencer Bower, *op. cit.* 356. But if equitable estoppel is a shield and not a sword, all that the son in that case could legally have done was to *resist* eviction rather than *claim* the freehold.

[7] See, however, Hargreaves, *Licensed Possessors* (1953) 69 L.Q.R. 466 at 476. For a fuller analysis, see *Licence, Interest and Contract* to be published by the *Canadian Bar Review*.

[8] *Errington* v. *Errington* [1952] 1 K.B. 290.

[9] *Cf.* Somervell L.J. [1952] 1 K.B. at 293–294; and also Hodson L.J. at 300.

unsuspectingly) volunteers to whom equity has vowed not to render assistance.[10]

Finally, we come to a more unexpected medium of enforcement which is the tort of misrepresentation.[11] Its relevance is twofold. Although, in the first place, a promise differs from a representation, since a promise is an undertaking for the future and a representation a statement about existing facts, in many situations promise and representation completely overlap. The reason is that even a representation about existing facts must imply some assurance about the continuance of those facts; moreover, a person who, by a misrepresentation, is induced to embark upon detrimental action relies more upon the assurance that the stated facts will, at any rate for the time being, continue to exist than upon a mere description of facts presently obtaining.[12] This is particularly true where the statements concern a representor's personal data rather than being information about external things or other people. To give only one example: If A makes a gift-promise to B, which sounds sincere but is a deliberate lie, it would matter nothing whether A's statement be called deceit or a false promise.[13] Secondly, the concept of misrepresentation can be especially useful in a more limited class of situations. Thus suppose that A says to B: "I have enough money should you decide to buy Blackacre." We do not normally regard such a statement as a definite donative promise, although the particular relationship between A and B may be such that B would be eminently justified in thinking that in buying Blackacre he was certain to get some financial help from A. Many years ago, Sir Samuel Romilly gave a telling example of such a situation: "Suppose a man the frequent guest of another in the country, adjoining whose seat is a piece of ground that would add considerably to the beauty and enjoyment of the place, but an enormous price is asked; that the guest, attached to the place, desires his friend to contract for that piece of ground for him, and says he will pay for it, and the other contracts accordingly, and pays far beyond the value, would a court of equity permit that man to recede from his engagement? Would

[10] On this point, see Pound, 13 Illin.L.R. 667 at 668. The new equitable development has also brought the expression "family arrangement" back into fashion. This expression had lain somewhat dormant; it used to refer to a special set of rules: see *Westby* v. *Westby* (1842) 2 Dr. & War. 502; *Hoblyn* v. *Hoblyn* (1889) 41 Ch.D. 200.

[11] *Cf.* Seavey, *Reliance upon Gratuitous Promises and other Conduct* (1951) 64 Harv.L.R. 913; Note, (1931) 45 Harv.L.R. 164.

[12] While it has been realised that promises imply statements of existing facts, it seems to have been generally overlooked that, conversely, a representation of existing fact implies some assurance *de futuro*. This may be the reason for some current difficulties about statements subsequently becoming false; see, *e.g.*, *With* v. *O'Flanagan* [1936] Ch. 575 at 584.

[13] A relevant example is *Beyers* v. *Green* [1936] 1 All E.R. 613. The *Restatement of Contracts*, § 473, Comment *d*, states that a promise without sufficient consideration made with an undisclosed intent of not performing is not fraud. But Professor Seavey has shown that this is an untenable position; see *loc. cit.*, 924–925, note 94.

not that be considered a fraud in respect of the consideration—an engagement contracted at the request of another, into which, without that motive, the party contracting would not have entered? "[14] This language may sound old-fashioned, but it does make the essential point. The point is that because of its emphasis on the justifiability of a reliance, as well as the damage to the person misled, misrepresentation can serve as an additional instrument for enforcing gratuitous promises; and in particular those promises the "promissory" nature of which is either concealed or indeterminate. This instrument is available for marginal situations not covered by the enforcement-devices previously explained.

This conclusion may be criticised on the ground that it overlooks the modern distinction regarding the availability of damages, inaugurated by *Derry* v. *Peck*,[15] *i.e.*, the distinction between equitable and legal fraud and therewith between intentional and innocent misrepresentation. But this criticism would be ill-founded. For where a person, as in our type of situation, misrepresents his financial ability to help, an operative distinction between fraud and innocence becomes impracticable. Where, for example, A states that he has all the money his friend wants, and then turns out to be a pauper, it would be impossible to prove that he was either an intentional or reckless liar or an honest, though misguided, altruist: to every charge of bad faith, A could respond with injured innocence, and to A's every defence of honest mistake, at least extreme carelessness about his finances could be the reply.

Nor must this link between a gratuitous promise and the fact of misrepresentation be confused with the workings of estoppel, that is, estoppel by "encouragement of acquiescence."[16] Estoppel cannot be used for making good completely executory gifts, because it is not a separate cause of action.[17] As the law at present stands, all that estoppel can do is to intervene in (what might be called) half-completed gifts. These arise where a donor has encouraged the donee to use his property, usually land, without conveying full title to him. If the donor subsequently tries to oust the donee, who may in the meantime have invested heavily in reliance on the donor's acquiescence, the former may be estopped from upsetting the *status quo*. The donee may thus obtain a right to continue enjoyment, though (without more) he will not acquire a saleable title.[18]

[14] *Crosbie* v. *McDoual* (1806) 13 Ves. 148 at 155. Observe that the guest does not make the host his agent to buy the adjoining property for himself. The property is to be a gift in the enjoyment of which the guest hopes to share. *Crosbie* was followed in *Skidmore* v. *Bradford* (1869) L.R. 8 Eq. 134.

[15] (1889) 14 App.Cas. 337.

[16] See generally Spencer Bower, *op. cit.* 351 *et seq.*

[17] *Ibid.* at 15–16.

[18] *Cf. Beaufort* v. *Patrick* (1853) 17 Beav. 60; *Plimmer* v. *The Mayor of Wellington* (1884) 9 App.Cas. 699.

Rational Basis of Rules Governing Enforceability

Let us take stock of the effective position. To do this we must cut across the previous pigeon-holes and indicate the substantive criteria that make for the enforceability of (at any rate some) gift-promises. Putting aside the American innovations and confining ourselves to English law, it is clear that two principal ideas dominate the emergent pattern. First, what will be called "parental" promises of gifts are enforceable if they lead to a change in the promisee's position. "Parental" here includes fathers-in-law and uncles and may (in a somewhat extended sense) include a gratuitous promise by a master to his old servant.[19] Parental promises of future gifts (*i.e.*, promises to settle property on young or even unborn children) can, subject to certain limitations, become irrevocable even without change of position since no such change is contemplated at least for the time being. The second idea is the protection of a promisee's reliance on a donative promise causing detriment or damage. This partly coincides with the enforcement of parental promises leading to change of position, but the protection of reliance is both narrower and wider. It is narrower inasmuch as the reliance has to be justifiable in any given situation as well as followed by material damage, whereas in the parental promise the justifiability of the reliance is already assumed and the damage (change of position) may merely consist of a happy marriage. It is also wider because the protection of reliance is not limited to "parental" situations but extends to the assurance of friends, though (because of the requirement of justifiable reliance) probably not beyond them. These ideas are strikingly realistic. In enforcing the parental promise the law but reflects its wider policy that makes for the parental support and responsibility to children; and in enforcing specific assurances of friends, the law recognises a fact of common experience, namely, where personal relations are close one may justifiably expect no abrupt withdrawal of the helping hand. These points, moreover, permit the underlying legal rationale to be stated more explicitly. For it is now possible to say that the law will only enforce such executory gifts as have a definite and tangible purpose, a purpose that envisages either filial advancement or friendly assistance; the law will not enforce mere promises of presents.[20] Nor is this pattern of enforcement, even if somewhat austere, basically unsound. For once parental or friendly assistance-promises are taken care of, what other gift-promises have we?

[19] Thus in *Foster* v. *Robinson* [1951] 1 K.B. 149, Evershed M.R. said (at 155–156) that if an employer tells his old servant too old for work that he can stay on in his cottage rent-free for the rest of his days, the employer is not entitled to revoke the licence.

[20] This contrast between advancement and assistance on the one hand, and presents and similar gratuities on the other, may also help to explain (and restrict) the well-known decisions in *Irons* v. *Smallpiece* (1819) 2 B. & Ald. 551 and *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57.

What remains are gift-promises that have no definite purpose but are purely altruistic,[1] or gift-promises from strangers, or (what the French call) *liberalités*,[2] which are the corrupting inducements that men often promise during courtship. The *liberalité* need not detain us further: if the suitor's intentions are honourable, his gift-promise would also be altruistic; if his intentions are openly contrived public policy would anyhow not protect the lady.[3] But the pure altruist and the stranger require more attention; for it will moreover be seen that their gift-promises are closely connected. Things being what they are (and apparently always have been), only a fool would rely on a promise that voices a sudden affection.[4] Since, again, these promises would not be intended to assist or support the promisee in a (by both) contemplated course of action, the promisee would not be worse off than before the promised benefaction; it is true that his financial expectations may be aroused, but he would suffer no specific damage.[5] Above all, personal altruism is rare and from strangers even rarer; and Williston's famous millionaire's promise to the tramp is, if not entirely apocryphal, only conspicuous by its absence.[6] It is for these reasons, of (broadly) rarity and implausibility alike, that these gift-promises have never presented urgent claims for legal enforcement; it is for exactly opposite reasons that the law has intervened with regard to the more tangible promises of assistance and advancement.

With this rationale established, another question immediately arises. How (if at all) is the rationale affected by the traditional doctrine that only such gratuitous promises are enforceable which are made under seal. For the seal is said to import the (otherwise lacking) consideration [7]; and modern lawyers have rationalised this formalism by emphasising its cautionary function.[8] The argument is that the law neither does nor should compel the execution of a promised gift without an, as it were, especially careful and

1 "In actual life almost the only purely benevolent promise is the charitable subscription, and such promises are made because charitable institutions put on campaigns for raising money." Havighurst, *Consideration, Ethics and Administration* (1942) 42 Col.L.R. 7 at 17.

2 See Lloyd, *Public Policy: A Comparative Study in English and French Law* (1953) 57.

3 For engagement-rings, see at note 17 *infra*.

4 See further on this point Pound, *An Introduction to the Philosophy of Law*, 279–280. It is of course possible to conceive of a social system where altruism is as closely organised as are our more selfish relationships today; but it would be impossible to predict its outward forms and legal relations. See Sharp, *The Limits of Law*, Ethics, lxi (1951), 270 at 283n.

5 Hence gifts have been called "sterile transactions": see Bufnoir, *Propriété et Contrat* (2nd ed. 1924) 487, and Fuller, *loc. cit.* 815.

6 Williston, *op. cit.*, § 112; Kessler and Sharp, *op. cit.*, 207 *et seq.* See also Hays, *Formal Contracts and Consideration* (1941) 41 Col.L.R. 849 at 860–861 where it is pointed out that there has been remarkably little litigation on pure gift-promises. Similarly, Havighurst, *loc. cit.*, 15.

7 *Cf. Sharington* v. *Strotton* (1565) 1 Plowd. 298 at 308–309; 2 Blackstone, *Commentaries* (23rd ed. 1854) 582–583; 1 Fonblanque, *Treatise of Equity*, 26.

8 For a full discussion, see Fuller, *loc. cit.* at 800 *et seq.*; and see Sharp, *Pacta Sunt Servanda* (1941) 41 Col.L.R. 783 at 788.

superior promise that is signed, sealed and delivered. But this argument is somewhat misconceived, and misconceived because the alternatives of seal or consideration are too sweepingly stated. For one thing, the law (as we have seen) does in one way or another enforce many gift-promises, even if they are merely informal and even where they lack strict consideration. For another thing, even the supposedly omnipotent deed may, in view of the rule in *Milroy* v. *Lord*,[9] be only a very poor substitute for an informal gratuitous promise. The explanation is that the deed, being "voluntary," would in equity remain an imperfect gift, so that the donor would not be compelled to complete it. The donee would, of course, have a legal right to damages for breach of covenant, but it is difficult to see where such damages would ever compensate the donee for the total loss of the value of the promised benefaction.[10]

There are, indeed, two situations in which a formal covenant will lend enforceability to a gratuitous promise. One is the charitable subscription; the other the promise to pay reward for so-called past consideration.[11] The English and American peculiarities of the former have already been noticed; nor is this the occasion for a full discussion of the second. It must therefore be sufficient to say that neither situation invalidates the basic rationale behind the enforceability of promises of assistance. For this rationale is confined to dealings between private individuals, and excludes promises to charitable institutions; the rationale also still holds good as regards assistance for the future, it is not meant to cover a subsequent promise to repay a promisee's past and unrequested actions.[12]

Executed Gifts

To turn to executed or completed gifts. Here the legal position is comparatively straightforward,[13] except for one more difficult

[9] (1862) 4 De G.F. & J. 264.

[10] The inadequacy of the remedy in damages can best be seen when we apply the usual principles to the breach of (voluntary) covenant. Not only would the promisee be generally unable to show actual damages in money, there being here no counterpart to loss of profit, etc., but it would also come under a duty to mitigate the loss, *i.e.*, stop relying on a gift not forthcoming. The main damage is, of course, the promisor's refusal to hand over the gift; but this he is *ex hypothesi* entitled to do if equity denies specific execution. For an attempt to get at this damage problem, see Note, (1939) 48 Yale L.J. 1036 at 1038–1039.

[11] Another instance where the deed would help is the situation of *Foakes* v. *Beer* (1884) 9 App.Cas. 605. But debtor-creditor arrangements are not, strictly speaking, gratuitous even if they lack their peppercorn to constitute a valid accord and satisfaction.

[12] But on the basis of the promise of assistance (see at note 19, p. 248, *supra*), there is perhaps nothing to prevent English courts from following a fascinating Alabama decision, where a man crippled for life in saving the life of his employer and the latter's promise to assist him with a life-long annuity was held enforceable: *Webb* v. *McGowin* (1935) 27 Ala.App. 82, 168 So. 196. And see Sharp, *loc. cit.* 789; Havighurst, *loc. cit.* 20; Kessler and Sharp, *op. cit.* 229.

[13] See generally Vaines, *op. cit.* 193–196.

problem. The main position is that, once a donor has transferred the gift, he can no longer revoke it unless his donative intention is vitiated by mistake, duress or misrepresentation.[14] But, unlike the French civil code,[15] English law does not make a gift returnable in whole or in part, even if (i) the beneficiary shows himself ungrateful or (ii) the donor's circumstances so change for the worse that a donee's reciprocal support would be desirable and opportune. Much can be said for refusing to meddle in these situations, especially because the returnability of gifts would have to depend on too many imprecise and personal factors. Yet there are also some clearer cases. Suppose a donee just presented with a handsome benefaction returns not gratitude but violence to the donor. Is the benefactor to remain unable to reclaim his gift? His moral "right" would be generally undisputed, though it is difficult to suggest a tenable legal theory to enforce it. The nearest approach is the resulting trust coupled with the presumption of advancement. Thus, in the usual example, where A acquires property with B's money, the property will in equity "result" back to B unless B can be presumed to have intended A's advancement.[16] By somewhat extending this idea, we could say that where a donee is violently ungrateful, the donor could not be presumed to have intended the continuance of the gift. Or to put it differently, a donor's gift must be regarded as subject to a condition that the donee conducts himself in a manner not incompatible with the intention of advancement. Indeed, a similar idea operates in the case of engagement-rings, where the ring is made returnable should the marriage be called off.[17] Clearly, whatever it is that a true altruist might expect, those who by gifts assist or wish to give enjoyment to others, do so for the sake of an affection that excludes brutal thanks. In short, providing for the returnability of certain gifts, equity would only have to spell out what is a usual donative intention. Nor is this to demand a new creative effort; for equity has, for several centuries now, intervened to articulate dispositive intentions not only in testamentary,[18] but also in respect of other *post-mortem* gifts.[19] Thus if the law can intervene in "mortuary" donations,

[14] *Ibid.* 190.

[15] Arts. 953–966. The position is similar in most continental codes.

[16] See, *e.g.*, *Dyer* v. *Dyer* (1788) 2 Cox Eq.C. 92; and generally Keeton, *op. cit.* 187 *et seq.*; Snell, *op. cit.* 150 *et seq.* In practice the presumption of advancement operates only for advances to wives and children or advances by people *in loco parentis*. *Cf. Tucker* v. *Burrow* (1865) 2 H. & M. 515.

[17] *Jacobs* v. *Davis* [1917] 2 K.B. 532. The problem is an old one: see *Oldenburgh's Case* (1676) Freem.K.B. 213, *sub nom. Beaumont* v. ————, 2 Mod.Rep. 140; *Robinson* v. *Cumming* (1742) 2 Atk. 409.

[18] Many equitable doctrines have been developed for this precise purpose: conversion and reconversion, election, satisfaction and performance, and ademption. See Keeton, *An Introduction to Equity* (3rd ed. 1952) 207 *et seq.*, and see also Marshall, *Anachronisms in Equity* (1950) 3 *Current Legal Problems*.

[19] Thus equity has gone a long way to enforce *post-mortem* gifts, though they do not comply with the Statute of Wills. Examples are the rule in *Strong*

there is no substantial reason to prevent similar intervention with regard to gratuities *inter vivos*.

Favours Differentiated from Gifts

Our last task is to examine the legal nature of a favour. A favour is the gratuitous promise, or the gratuitous doing, of a service, and it therefore differs from a gift inasmuch as the latter consists of a promised or completed transfer of property or money. And because its province is gratuitous service, a favour gives rise to different situations and creates also different problems.[20] Take the ordinary case where A is, without reward, to keep B's things for a period or to carry B's property. It is old law that the relation between A and B constitutes a bailment ("deposit" or "carriage") as soon as B entrusts his things to A[1]; and it may be remembered that the famous case of *Coggs* v. *Bernard*[2] arose out of A's gratuitous carriage of B's brandy. Yet if the relation is one of bailment, two things are implicit: the bailee must use at least some care and skill towards B's property; and more important, he can be under no duty *before* he becomes bailee as depositary or carrier. It also follows that while the law has thus watched the manner of A's performance, it has not enforced a completely executory favour. These principles were carried over to gratuitous agency through the decision in *Wilkinson* v. *Coverdale*.[3] Here A "undertook," without consideration, to procure a policy of insurance for B with C. When B's house burned down, it turned out that A had been so negligent in perfecting the insurance that B was unable to recover anything from C and suffered total loss. Lord Kenyon C.J. "acquiesced in the distinction," that even though A is not liable for an initial failure to perform, he is liable for negligent performance.[4]

v. *Bird* (1874) 18 Eq. 315; the *donatio mortis causa*; and especially the growing doctrine of secret and half-secret trusts. These certainly amend the statutory requirements of testamentary dispositions, though "one is not supposed to call this 'amending'"; see L. A. Sheridan, *English and Irish Secret Trusts* (1951) 67 L.Q.R. 314.

20 Unfortunately, gifts and favours are usually lumped together, with complete neglect of the differences arising from gratuitous promises of things and those of service. Perhaps the first recognition of the "favour" can be found in *Webb* v. *Paternoster* (1619) 2 Roll.Rep. 143, 152; Palm. 71; Poph. 151 where a distinction was made between licences for profit and licences for pleasure. See also Street, *Foundations of Legal Liability*, ii, 251.

1 See on all this Paton, *Bailment in the Common Law* (1952) 93 *et seq.*; 2 Halsbury's *Laws of England* (3rd ed. 1953) 97 *et seq.*

2 (1703) 2 Ld.Raym. 909; *cf.* also Cheshire and Fifoot, *op. cit.* 65–66; Salmond and Williams, *op. cit.* 107–109.

3 (1793) 1 Esp. 75. See also Beale, *Gratuitous Undertakings* (1891) 5 Harv.L.R. 222; Monahan, *Gratuitous Undertakings* (1923) 9 Corn.L.Q. 54; Arterburn, *Liabilities for Breach of Gratuitous Promises* (1927) 22 Illin.L.R. 161.

4 At 76. Erskine produced a manuscript note of the (unreported) *nisi prius* case of *Wallace* v. *Tellfair*, in which Buller J. had already adopted that distinction. See also 1 Williston, *op. cit.* § 138. A similar distinction has now also been applied to the giving of gratuitous advice: see *De La Bere* v. *Pearson* [1908] 1 K.B. 280; *Banbury* v. *The Bank of Montreal* [1918] A.C. 626 at 657, 689; *cf.* Cheshire and Fifoot, *op. cit.* 66–67.

Nevertheless this distinction can often be unfortunate. "What valid distinction, for instance, is there where A has promised to take a policy of insurance on B's house and takes none, and a case where he makes such a promise and takes one so improperly drawn that it proves uncollectable when the property burns?"[5] To avoid this or similar results, the *Restatement of Agency* has, in section 378, provided that even a gratuitous agent must perform his promise, if the principal relying on the agent refrains from taking other steps to secure performance or if the agent does not notify the principal of his intention not to perform while the latter still has available means to secure performance; the agent, however, is under no duty to his principal if at the time of his promise the principal would have had no other person to perform the service except that particular agent.[6] We can see that, within these limitations, section 378 is far less drastic than might appear on first impression. Nor is it in conflict with existing English authority. Even the principle laid down in *Elsee* v. *Gatward*,[7] to the effect that a voluntary promisor may abandon his service if and when he wishes, can easily be reconciled with that section. For when Gatward refused to complete his gratuitous labour, Elsee was not only notified of his refusal but was then also able to secure alternative performance. In these circumstances, Elsee had only himself to blame if he subsequently suffered damage.

If such be the operative rules, the law is by no means unsatisfactory. There is obviously a real difference between a favour and paid-for service, and we cannot attach the same obligations to a courtesy as we attach to a valuable bargain. Only where non-performance of a favour would cause *unavoidable* harm does legal intervention seem appropriate or needful.[8] Again, it is mainly in connection with favours that the usual arguments directed against the enforceability of gratuitous promises find their proper application, *i.e.*, the argument that a gratuitous promise is often careless, and the (largely concomitant) argument that, outside bargains, we need a sphere where promises can be revoked with impunity.[9] Suppose the simple case where A promises B a lift and A then discovers his inability to do so because of previous engagements. We all accept A's "right" to revoke his promise, though we may not like it to occur "at the last moment." But why do we accept this? The answer is briefly that people (relatives, friends, acquaintances and even strangers) often promise favours, and that in making such promises they may often forget previous and more

[5] Shattuck, *loc. cit.* 915–916.
[6] See Comments *b* and *c*; *cf.* also Seavy, *loc. cit.* 927.
[7] (1793) 5 T.R. 143; and see Powell, *The Law of Agency* (1952) 246.
[8] Such, it is submitted, is the concise effect of § 378 of the Agency *Restatement*. It needs emphasis, however, that the harm must be due to the agent's non-performance and his failure to give timely notice, not to non-performance where the principal had anyhow no other means of securing performance.
[9] On these arguments, see especially Fuller, *loc. cit.* 813 and *passim*.

pressing engagements." It is principally in this sense that a gratuitous promise can be sufficiently careless to require a right of revocation.[10] For unlike the professional carrier whose business is precisely to give reliable undertakings for service, the promisor of a favour may have vastly more important things to do than to provide free transport. We can now see that the rationale applicable to favours is not at all identical with that applying to gifts. People seem far more willing to do or promise kindly turns than they are willing to part with valuable assets: a millionaire's gift-promise to a tramp is so rare as to be legend; a stranger giving a hitch-hiker a lift is a daily occurrence. Furthermore, the legal treatment of favours seems a direct expression of our socially basic division of labour. Even where, for example, the promisor does not do the good turn, the promisee is usually still able to buy other and equivalent service; but in the case of those parental or friendly gift-promises which we have seen to be enforceable, the promisee has no alternative source of support or help apart from those persons from whom such help can be expected. The law, in a word, may not make philanthropy a common calling; but it does give effect to parental advancement or friendly assistance, and it also watches over the manner in which we do favours.

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[10] So as Sharp, *loc. cit.* 788, has said: "A person in a benevolent mood may quite intelligibly be regarded as needing some protection. Perhaps for somewhat comparable psychological reasons, a promise to come to dinner, even if its violation results in the waste of a magnificent roast, is felt to be hardly a proper subject for litigation."

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QUASI-CONTRACT

A New Classification

It is a commonplace that Quasi-Contract is a waste paper basket for the disposal of a "heterogeneous collection of cases"[1] defying orthodox methods of classification; but it is hoped to show in the succeeding paragraphs that the situation is not so bad as that—that, although there is no "Rationale of Quasi-Contract,"[2] there are yet no more than three clearly classifiable groups in the basket which, when separated from each other, can be linked up to "other heads of the law": these are the liabilities to submit to a false claim because estopped by one's own wrong; to pay for goods or services not requested; and to restore money because it belongs to the plaintiff.[3] There is little in common between the three except that Assumpsit came to be the remedy for all of them; that in none is there any real contract; and that they are all based on justice. The last characteristic is shared with most of the rest of the law, and the other two points provide inadequate reason for grouping the three classes together.

Estoppels

It is the estoppels which have caused most of the difficulty in classification: when they are collected and segregated the picture becomes clearer. The first is the Quasi-Contractual extension of *quantum meruit*, the basis of which is an "implied contract" which both parties knew was not being made. If a man orders a

[1] Cheshire and Fifoot on *Contract*, 3rd ed., p. 537. Winfield also (*Province of Tort*, p. 118) says: "It is no man's land, not in the sense that there are constant battles for it but that nobody wants it," and on p. 155 refers to the "heterogeneous topics falling under each main head." Munkman, in *The Law of Quasi-Contracts*, p. 1, says that "It is only by degrees that contract and tort have differentiated themselves from the general body of the common law. In this process of differentiation they have left behind a residue of cases where the common law gave a remedy, but which did not fall under the heading of either contract or tort."

[2] The title of Section II of Cheshire and Fifoot's chapter on Quasi-Contract. The learned authors say on this point (at p. 537) that "the attempts made from time to time to tame the refractory material have provoked acute controversy, and it certainly cannot be said that they have as yet achieved success." It is submitted that they never will, so long as the attempt is to find a single explanation for the whole of quasi-contract.

[3] Such a division is not altogether novel: Munkman, in *The Law of Quasi-Contracts*, pp. 19–20, also classified quasi-contracts into three groups, of which the first, Restitution, corresponds exactly with the last suggested above. The whole of this second group, Reimbursement, falls within the second group above; and his third group, Recompense, falls partly in that and partly in the first above: he does not differentiate the Estoppels.

dozen bottles of whisky and his dealer sends ten bottles with two of brandy and a corresponding invoice, but by mistake, the customer is justified in believing that an offer of the brandy is intended at the invoice price, the dealer will be estopped from denying that that was his intention. But if, with the ten bottles of whisky and two of brandy there is an invoice for a dozen of whisky[4] the customer knows that there is no offer of the brandy, and if he drinks it he cannot excuse his conversion by a plea that he was misled. In this case it is the dealer who can plead a contract, but for a different reason, and he may be able to recover the price which he has been accustomed to charge that customer, even if it is more than the market price, which would be all that he could claim in conversion. It seems an inadequate explanation of this estoppel to say that a defendant who has wronged the plaintiff twice, first by taking his goods and secondly by refusing to pay for them, cannot well complain if the plaintiff waives the first wrong and sues only on the second, assigning as the origin of his claim a fictitious but lawful transaction instead of the defendant's real and unlawful act.

A variation on this example is afforded by part of the rule in sections 18 (4) and 35 of the Sale of Goods Act: where a person to whom goods have been delivered on sale or return, or in purported performance of a contract, "does any act in relation to them which is inconsistent with the ownership of the seller"[5] he "is deemed to have accepted" the offer or delivery as the case may be. If he has not so accepted he has committed a conversion, and the seller cannot weave a contract out of the estoppel described in *Smith* v. *Hughes*,[6] saying that he was misled by the other's conduct, for he may well not come to know of the defendant's act before also knowing the truth.[7] But on the principle that the defendant cannot take advantage of his own wrong the plaintiff may recover, as if there had been a contract, not merely the value of the goods but the price for which he had stipulated.

A similar principle is to be found in the law of trusts. A trustee who commits a breach of trust by putting the trust property to profitable use has not merely to replace with interest the trust property wrongfully used—which would repair the only damage suffered by the trust—but to account for the profit as if (contrary to the truth) his operations had not been in breach of his trust but in performance of it. If law and equity had not been two distinct systems this might have been called Quasi-Trust.

Finally quasi-contract has twice been allowed as an alternative neither to a tort nor to a breach of trust but to breach of a

[4] A modification of the situation suggested by Lord Atkin in *Steven* v. *Bromley* [1919] 2 K.B. 722, 728. Compare the case of goods left at the wrong door.
[5] These are not the words of s. 18 (4), but *Genn* v. *Winkel* (1912) 197 L.T. 434, was decided on the basis of its words bearing that meaning.
[6] (1871) L.R. 6 Q.B. 597, 607.
[7] As was the case in *Genn* v. *Winkel*, above.

genuine contract: an agent whose authority had been prematurely revoked,[8] and a writer whose publishers had changed their minds when his book was only half written,[9] were allowed to recover remuneration for their time and labour lost in the business of the agency and in writing by waiving the breach and suing on a fictitious contract to pay for what had been so far done. The plaintiff could perhaps have assessed at the same figure the damages for breach of the real contract; but since he chose to complain of one wrong only, the failure to pay money, the defendant could not escape by answering that he had been guilty not of one but of two wrongs, not only the failure to pay but the antecedent repudiation of the genuine contract.

Payment

Of the second group, liability to pay for goods or services not requested, it is immediately plain that such a liability is not universal. Where the benefactor is a pure volunteer—or more bluntly a busybody—he can claim nothing, for, as Lord Kenyon C.J. said in 1799,[10] "It has been said that where one person is benefited by the payment of money by another, the law raises an *assumpsit* against the former; but that I deny: if that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my creditor,[11] *nolens volens*"; or in the terser words of Bowen L.J. in 1886,[12] "Liabilities are not to be forced on people behind their backs." But it is equally plain that some liabilities can be forced on people behind their backs. It is generally said that salvage is a peculiarity of Admiralty jurisdiction,[13] and the observation is justified empirically by the fact that apart from salvage it is very rare to find a similar degree of unavoidable necessity.[14] But it is not an absolute truth that salvage has no companion: executors once found that they had to pay the reasonable expenses of burying their testator, though incurred without their request[15]; and conversely it is not true that any volunteer—as for instance a surreptitious repairer—may recover remuneration merely by suing in an Admiralty court.[16]

8 *De Bernardy* v. *Harding* (1855) 8 Ex. 822.
9 *Planché* v. *Colburn* (1831) 8 Bing. 14, 1 M. & S. 51, 1 L.J.C.P. 7.
10 *Exall* v. *Partridge* (1799) 8 T.R. 308, 310.
11 "Debtor" in the report—a plain slip of the tongue or pen, as is continually being pointed out. The result here deprecated could not then, of course, be achieved by an assignment of the debt.
12 *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234, 248.
13 Cheshire and Fifoot on *Contract*, 3rd ed., p. 519.
14 A finder of goods who incurs in preserving them an expense without which they would certainly perish cannot recover, both because the necessity is less compelling and because the element of humanity is totally lacking.
15 *Rogers* v. *Price* (1829) 3 Y. & J. 31.
16 *Forman* v. *The Liddesdale* [1900] A.C. 190, an appeal to the Privy Council from the Vice-Admiralty Court of Victoria.

The rule is the same when there is in fact a request, but it is made by a person to whose request legal effect is denied. On the supply of necessaries—but only necessaries—to persons incapable of contracting to pay for them,[17] the incapable's estate is bound, despite the lack of contract, to pay a reasonable price. The reason for this must be that necessaries, *ex vi termini*, would have had to be supplied by someone, and accordingly paid for, and it is a matter of indifference to the incapable whom he pays. To this class must also be referred the curious case of *Craven-Ellis* v. *Canons Ltd.*[18] There the plaintiff was appointed managing director of a company by two persons controlling (but not owning) nearly all the shares and purporting to act as directors. They had indeed been validly appointed as directors, but by failing to take up their qualifying shares had become disqualified, so that the plaintiff's appointment was a nullity. He was nevertheless allowed to recover his remuneration from the company, and the main reason was probably "the company's acceptance of such services, which, if they had not been performed by the plaintiff, they would have had to get some other agent to carry out."[19] The present Lord Justice Denning found[20] in the reference to acceptance of the plaintiff's services an indication that the two nominal shareholders had in general meeting unanimously and formally accepted them, thereby curing the defect in the appointment; but this is hardly possible for two reasons, first that so important a fact would hardly have been left to be inferred from chance references in a judgment so plainly determined to see the plaintiff paid, and secondly that it was emphasised more than once that the basis of the decision was quasi-contract, whereas if there had been any ratification by a general meeting the basis would be plain contract. It is suggested that "accepted" here means no more than received, and that the root of the decision is that such services are to a company the equivalent of necessaries supplied to an incapable.

A special case of service is the performance of another's duty. In *Brooks Wharf* v. *Goodman Bros.*[1] for example warehousemen compelled to pay an import duty were allowed to recover over from the importers who were principally liable, in spite of there being no such contract between them and the importers. The basis of the liability is the actual performance of another's duty; and there are only two things which prevent the right to reimbursement for such performance, one that the benefactor was a

[17] Most commonly an infant, though he is capable of making a valid present payment and also of binding himself even by future contracts if considered to be for his benefit—the true explanation of *Roberts* v. *Gray* [1913] 1 K.B. 520.

[18] [1936] 2 K.B. 403.

[19] At p. 412, the concluding words of Greer L.J.'s judgment.

[20] (1939) 55 L.Q.R. 54.

[1] [1937] 1 K.B. 534.

busybody [2] and the other that, though not intending to meddle with another's debt, he has put himself purely for his own benefit in a position where it may be exacted from him. This latter unusual situation is illustrated by *Griffinhoofe* v. *Daubuz*,[3] where a tenant after the expiry of his lease left haystacks by gratuitous licence on his landlord's land: they were seized in satisfaction of a debt due from his landlord, and the tenant failed to obtain reimbursement from him. There is no conflict between this decision and *Exall* v. *Partridge*,[4] where the principal debtor was a coachmaker and the distress was a stranger's carriage left with him not gratuitously but evidently in the course of his business.

The liabilities in the last paragraph are comprised under the head of subrogation. Those classed under contribution are not in reality a separate head, but only special instances of subrogation.[5] Here again one might imply subsidiary contract between the co-contractors themselves to contribute if any were compelled to overpay; but here again the duty exists even if, as sometimes happens in the case of co-sureties, they are ignorant of each other's existence. As Eyre C.B. said in 1787,[6] "If we take a view of the cases *both in law and equity*, we shall find that contribution is bottomed and fixed on general principles of justice and does not spring from contract though contract may qualify it." Once the necessity for even the implication of a contract is abandoned, the justice of indemnity from, and contribution by, fraudulent co-trustees [7] and joint tortfeasors is not defeated by the illegality of such a fictitious contract, and is now happily part of the law.

The general principle which underlies all this class of liabilities

[2] The liability of a principal debtor to reimburse a surety who has paid for him depends on the same principle: it does not depend on assignment by the creditor to the surety, nor on the actual contract which usually exists between the principal debtor and the surety—though the *request* of the principal debtor is perhaps necessary to prevent the surety being a busybody. *Macclesfield Corporation* v. *Great Central Ry.* [1911] 2 K.B. 528, where the corporation, instead of compelling the railway by lawful process to repair a bridge, did the work itself and then sought unsuccessfully to recover its expenditure.

[3] (1855) 5 E. & B. 746.

[4] (1799) 8 T.R. 308: the real question was whether the coachmaker's co-tenants were equally liable, it being alleged in their defence that they had assigned their interests to him. It was held that they were liable, on the ground that the assignment did not affect their liability to the landlord.

[5] "Subrogation takes place, in the full sense of the word, when one person, on paying the debt of another, is entitled to stand in the shoes of the creditor, and to enforce against the debtor every right which the original creditor could have enforced against him." Munkman, p. 77. "The question of contribution arises when two persons are under the same liability, and one of them is compelled to pay the full amount. He may then have the right to call upon the other person to pay his proportionate share. *This right is really a special case of the right to reimbursement.*" Munkman, p. 81. Winfield also (*Law of Quasi-Contract*, p. 117) says: "Subrogation . . . is a doctrine allied to contribution."

[6] *Dering* v. *Lord Winchelsea* (1787) 1 Cox 318. Cheshire and Fifoot, at p. 474, note 3, credit Lord Mansfield with this judgment, but wrongly.

[7] So Snell, 23rd ed., p. 192: contra Winfield, *Law of Quasi-Contracts*, p. 113.

is not that, with some exceptions, no one need pay for a benefit that he has not requested, but rather that, with one exception, he must render an equivalent for every benefit received, whether requested or not, the exception being a benefit forced on him by the benefactor himself. A benefit neither requested by himself nor forced on him by the benefactor, must be forced on him by circumstances outside the control of either, whether operating on him, so as to make the benefit an unavoidable necessity to him, or on the benefactor, so as to make it impossible for him to avoid conferring the benefit—unless in the latter case the benefactor has purely for his own ends provoked the necessity. Where there is no request the liability to pay for the benefit is this branch of quasi-contract, and where is a request the liability is in contract, the benefit being the consideration. It is perhaps true to add that in every contract for consideration, and not only in *Lamplegh* v. *Brathwait*,[8] the actual promise to pay does not create but only quantifies the liability.[9] A contract without consideration creates a liability of a totally different kind as was recognised when the two actions of Debt and Covenant were distinct, and the clarity of Debt had not been obscured by the fictions of Assumpsit.

Restitution

The nature of the third class of quasi-contractual liability, to restore money which belongs to the plaintiff, is well illustrated by two judicial dicta, the first by Tindal C.J. in 1844, and the second by Lord Atkin in 1940:

1. "The ground and principle upon which this form of action is maintainable is that the defendant has received money which, *ex aequo et bono*, belongs to the plaintiff." [10]
2. "The man [a blackmailer] has my money, which I have not delivered to him with any real intention of passing to him the property. I sue him because he has the actual property taken." [11]

Tindal C.J. was of course speaking in a court of common law; and Lord Atkin was giving a common law example: he did not mean that the blackmailer became a constructive trustee for the blackmailed. What did they mean when they talked of money *belonging* to the plaintiff, and the *property* in money not passing with delivery? Money is not property in the same way as land and goods are property, not only because it is negotiable, but even

[8] (1615) Hob. 105.

[9] "The fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated as an admission which evidences or *as a positive bargain which fixes the amount* of that reasonable remuneration on the faith of which the service was originally rendered": *per* Bowen L.J., *Re Casey's Patents, Stewart* v. *Casey* [1892] 1 Ch. 104, 115–116. (Italics supplied.)

[10] *Edwards* v. *Bates* (1844) 7 M. & G. 599.

[11] *United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] A.C. 1, 29.

more because it is intangible: the actual cash is tangible, but cash is really only evidence of the essential, which is purchasing power. It is the typical example of property whose significance lies in its amount and not in its identity; but it is not the only example: a stockbroker makes effective restitution, for instance, at least of bearer stock, by replacing it by stock of the same kind and nominal value without the identical certificates. This quality in money makes it impossible without the help of equity to trace it into the hands of third parties; but it is submitted that it makes no difference as between wrongdoer and wronged. In the words of Lord Dunedin,

> " Both an action . . . to get back a specific chattel and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him." [12]

By " higher equity " he did not mean equity in the English sense, which he distinguished as " technical equity "; but as a technical form of action at law he thought that the action for money had and received escaped from the impossibility of vindicating money (by which he meant cash) in *forma specifica* only by founding itself on a fictitious contract; and he agreed with the other noble lords that a contract forbidden could not be imputed. This admitted technicality is answered by Lord Atkin's remark in the *United Australia* case:

> " When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred."

The substantial position remains as Lord Dunedin stated it; and as Lord Atkin elaborated it. If a man takes my valuable china vase he must give it back; and his duty is exactly the same if he takes my money—not in this case to restore the identical cash, which is irrelevant, but to restore that number of units of purchasing power. No one has suggested an implied contract in the thief of the vase to give it back, and no one would have suggested such a contract in the thief of the money but for the procedural advantages of Assumpsit over Debt. Again, if a man takes my valuable china vase on hire he must give it back with the amount of the hire; and if he borrows my money he must give it back with the stipulated interest. The obligation to pay the hire or the interest is genuinely contractual, and so may be the manner of the restitution; and in this instance it was thought in the nineteenth century that the bailee's duty of restitution is itself contractual, but that was only because the nineteenth century sought

[12] *Sinclair* v. *Brougham* [1914] A.C. 398, 436. The words " property or the proceeds of property " are not to be read disjunctively—property meaning the specific chattel and the proceeds of property meaning money—both mean both.

a contractual basis for almost everything. If there is a duty to restore whether there be a promise or not, that means that the promise even if made is irrelevant; and if it is not made there is certainly no need to imply it. The true explanation of the duty to restore is that I have a right that no one shall take what is mine: I may release that right in favour of another, whether contractually or gratuitously, but at the expiry of the time for which I released it the previous position re-emerges, and I must have it back.

As the duty does not arise from contract, so also it is independent of tort in the sense of an action for damages for a wrong. The obligation of a trespasser to pay mesne profits for the period of his occupation is a true duty of reparation for the harm done to the owner; but the duty to restore the land itself is entirely distinct. My right that others shall abstain from interference with my property is the primary right *in rem*, against all the world, from which on infringement flows my secondary right *in personam* not only to compensation from the particular person in possession for the harm already done, but also a right that he shall stop infringing my primary right by restoring possession. The difference which results from the property being money is only this, that I have no secondary right against the person in possession unless he is also the person who dispossessed me. This is a restriction on the extent of my right, but not a difference in its quality.

This is why a person deprived of his money by force,[13] threat[14] or fraud,[15] waives the tort by which the money changed hands: not because he is godlike but because the tort is irrelevant to his grievance. He sues not because the defendant deprived him of his money in the past, but because he has it in the present and must give it back. So when the defendant has intercepted money on its way to the plaintiff, the gravamen of the charge is not the conversion, for if the defendant were the plaintiff's duly appointed agent the duty to hand the money over is identical.[16] So it was that Assumpsit was used to recover from a usurper the profits of an office rightfully belonging to the plaintiff,[17] and from a fraudulent administrator (whose letters had been revoked) the proceeds of a sale of debentures belonging to the estate[18]; though these two cases could also be explained by saying that the defendant was estopped from denying his lawful agency.

[13] *Neate* v. *Harding* (1851) 6 Ex. 349.

[14] *Maskell* v. *Horner* [1915] 3 K.B. 1—a curious case in that the plaintiff's payments had been due at least in part to a mistake of law to the effect that he could not resist.

[15] *Refuge Assurance Co.* v. *Kettlewell* [1909] A.C. 243.

[16] The medieval remedy was Debt, preceded, if the sum was uncertain, by Account. It is a curious inversion to say with Munkman (*The Law of Quasi-Contracts*, p. 5) that medieval law had its own quasi-contractual remedies: it had the remedies, and it was a later disfigurement that substituted quasi-contract for them.

[17] *Howard* v. *Wood* (1679) 2 Lev. 245.

[18] *Lamine* v. *Dorrell* (1705) 2 Ld.Raym. 1216.

If it is possible to say of a payment to a blackmailer—or under any other form of undue influence—that it was made without any real intention of passing the property, it is only a small step forward to envisage a delivery of money accompanied indeed by a transfer of the title, but a conditional transfer: Lord Wright said in the *Fibrosa* case [19] that "the payment was originally conditional. The condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail." The important point is that the recipient's duty to repay is derived not from any independent promise to do so, whether implied or imputed, but from a condition annexed to the payment itself. Both interpretations are genuinely consensual though the transaction be tacit, but if the implication be of a condition there is no need of a contract—a point of some importance when the recipient lacks either capacity or authority to contract. The condition implied in the *Fibrosa* case [20] closely resembles that detected by Blackburn J. in *Taylor* v. *Caldwell*,[21] with the substitution of supervening illegality for supervening impossibility, and with the further difference that in the earlier case the condition qualified a promise and in the latter a transfer of property.[1]

That was an instance of a condition subsequent: the recovery of money paid under a mistake, whether or not caused by the payee's misrepresentation depends on a similarly implied condition precedent. This implication is not a fiction: to say that a payment is made on the footing of its being due and not a gift is only another way of saying that it is conditional on its being due. If it is not due the condition is broken and no title has passed with the delivery of possession: the payee is left holding money which is not his but the payer's, and which he must return for that reason and not because of a fictitious promise to do so. It is for this reason that mere carelessness in ascertaining the true facts [2] is no answer to the plaintiff: the question is whether the payment was subject to the condition, not whether if the plaintiff had been more careful it would never have been made. It is for this reason too that money paid recklessly, regardless of whether it be due or not, cannot be recovered [3]—not because recklessness deserves punishment but because it negatives the implication of

19 [1943] A.C. 32, 65.
20 [1943] A.C. 32.
21 (1863) 3 B. & S. 826.
1 Where the contract is illegal *in its inception* money paid under it cannot be recovered by pleading an implied condition that the contract should be legal—if only because the illegality of such a contract lies precisely in the intention (real or imputed) to behave illegally. That money so paid may be recovered before the illegal purpose is executed is not the result of an implied condition but an intervention of public policy, which is then better served by encouraging than by preventing the recovery.
2 *Kelly* v. *Solari* (1841) 9 M. & W. 54.
3 (1841) 9 M. & W. 54, 59.

the condition.[4] The condition must of course be known to the payee, or the payer will be estopped from denying what he made to appear to be his intention. It is in this sense only that "unilateral mistake" is ineffective, for it is not necessary that both parties should be mistaken: the payee is in no better a position because he knows and conceals the truth. As between the parties, there is no reason why the payer should not equally rely on a mistake of law: the reason why he may not springs from public policy, for, as Lord Ellenborough remarked,[5] "every man must be taken to be cognisant of the law: otherwise there is no saying to what extent the excuse of ignorance might not be carried." The underlying rule is not invalidated by this intervention.

It remains to examine the special mistake [6] involved in a contract with a person, natural or artificial, who is assumed erroneously to be capable of making that contract. On this point there are two illuminating dicta, both obiter, from America. The first is from *Marsh* v. *Fulton County*,[7] an action to enforce against a local body "an obligation attempted to be created in one way when the statute declares that it shall only be created in another and different way." The Supreme Court of the United States held that the action failed, but also observed:

> "We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. . . . The obligation to do justice rests on all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law independent of any statute, will compel restitution or compensation."

The second, in the same court twenty years later, provides a useful pendent:

> "To maintain such an action is not to affirm but to disaffirm the illegal [*i.e., ultra vires*] contract." [8] [9]

Illustration is provided by two cases, one English and the other

[4] See also, where a contract and not a payment was in question, *McRae* v. *Commonwealth Disposals Commission* (Australia: 1952), noted in (1952) 15 M.L.R. 229. Recklessness in ascertaining the facts disabled the commission from saying that their sale of a non-existent wreck on a reef was subject to a condition of its existence.

[5] *Bilbie* v. *Lumley* (1802) 2 East 469.

[6] According to Lord Sumner in *Sinclair* v. *Brougham* [1914] A.C. 398, 452, mistake cannot be urged when the transaction is *ultra vires* of a society by its rules and the parties *have notice* of the rules; but this is on its face directly contrary to *Kelly* v. *Solari* (above), which was not considered, and the true significance of the remark will appear later.

[7] (1870: U.S.) 10 Wall. 676, 684.

[8] *Central Transportation Co.* v. *Pullman's Car Co.* (1890: U.S.), 139 U.S. 24, 60. Here the incapable body was itself plaintiff, and the contract beyond its own powers.

[9] These two dicta were quoted (without inverted commas) in a judgment of the High Court of Calcutta in 1915: *Mathura Mohan Saha* v. *Ram Kumar Saha & Chittagong District Local Board*, I.L.R. 43 Cal. 790, 827. This was an action to recover money prepaid under a contract *intra vires* of the local body but *ultra vires* of the officers who concluded it. I owe this

American. In the *Phoenix* case [10] premiums had been paid for a marine insurance policy, marine insurance not being included in the company's objects. In a winding up after the occurrence of the event insured against the assured were not allowed to prove for the sum assured, but Page Wood V.-C. held that they could have the premiums back "even at law" as money had and received. Similarly in *Citizens' Central National Bank of New York* v. *Appleton* [11] a bank had allowed a customer an overdraft of $10,000, and in order to induce him to repay it had persuaded another bank to advance him $12,000 on their guarantee, $10,000 of which were paid direct to themselves. On the customer's bankruptcy the second bank sought to enforce the guarantee, but was met with the reply that the guarantee was *ultra vires* of the first bank. The Supreme Court held that the second bank could nevertheless recover the $10,000 as money had and received.

In both these instances it was possible to "disaffirm the contract" and give different relief on another ground. But where the contract is of loan this looks like a mere verbal manoeuvre: the contract to repay is unenforceable, but there is a quasi-contract to repay exactly the same amount. It is submitted that this is not a real difficulty, for the reason that as shown above the obligation to repay a loan is independent of any contract to do so.

The earliest English case appears to be that of the *Brunswick Building Society* [12] where in 1881 lenders tried to recover *at law* money lent to the Society beyond its prescribed limit of borrowing, and they failed on the ground that the money had never reached the Society, having stuck to the hands of the agent who had received it; but in the course of his judgment Baggallay L.J. said [13]:

> "If the Society had received the benefit of the £100, if for instance that amount had found its way to the credit of their banking account, the plaintiffs might . . . have been enabled to establish a claim against the Society to the extent of the benefit derived by them from that transaction." [14]

reference to Munkman (p. 45) who, it is submitted, is wrong to regard the decision as inconsistent with *Sinclair* v. *Brougham* [1914] A.C. 398, for there was no deficiency in the Local Board's assets.

[10] *Re Phoenix Life Assurance Co.* (1862) 2 J. & H. 441, followed by the Irish Court of Appeal in *Flood* v. *Irish Provident Assurance Co.* (1910) 46 Ir.L.T. 214.

[11] 216 U.S. 196 (1910).

[12] *Chapleo* v. *Brunswick Building Society* (1881) 6 Q.B.D. 696.

[13] At p. 711.

[14] In 1885 in equity, the Court of Appeal held on the contrary that the Society's liquidator could recover from a bank money actually paid to it by the Society in reduction of its overdraft, on the ground that the original overdraft was beyond the Society's power to incur—*Blackburn Building Society* v. *Cunliffe* (1882) 29 Ch.D. 902. But the House of Lords later held this decision to have been wrong, Lord Haldane L.C., saying that "the society ought . . . to have been regarded . . . as having simply returned to the bankers the latters' own money."—*Sinclair* v. *Brougham* [1914] A.C. 398, 426.

We come finally to *Sinclair* v. *Brougham*.[15] Here another building society had indulged for some time in an unauthorised banking business, and when it came to be wound up the liquidator was faced with claims from shareholders to the return of a little over a million sterling, and from the depositors in the bank of nearly eleven million. The assets, after allowing for outside creditors, had been enough for both, but, on account of the sudden depreciation in the society's investments which had necessitated the winding up, had ceased to be so. The liquidator applied to the court for directions. It being admitted that the express promise to repay the depositors, purported to have been made on the society's behalf, was void as beyond the society's powers, the depositors sought to recover the whole of their deposits as money had and received. The shareholders, on the other hand urged[16] that the society was under no legal obligation to the depositors and that they ought to be paid first, leaving only the balance for the depositors; but it was held that on that principle the balance also would have to go to the shareholders as surplus assets. So enormous an unearned profit they did not claim and would not have been allowed, and their claim to be paid in full fell with it. As for the depositors, the decision was that *in equity* the directors who received the deposits were trustees of the money, and to the money in their hands was therefore annexed an equitable right of property belonging to the depositors—Lord Haldane described it[17] as "property with which, in equity at all events, they had never parted." When that money was mixed with the society's own money, which the directors held in an equally fiduciary capacity, each side had an equitable charge on the whole, which in the absence of any special ability to trace and any special equitable considerations must rank equally with each other and so abate rateably.[18]

But before arriving at this conclusion the House, with a remarkable unanimity not only of result but of reasoning, held that *at law* the depositors would have had no remedy. Their Lordships took the view that the common law provided only two remedies: on an implied promise to repay, and a direct attack on the money taken. As to the implied promise Lord Sumner said[19]:

> "The law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid."

This is unanswerable; but it is not so obvious why the direct

[15] [1914] A.C. 398.
[16] Relying on the *Guardian Building Society Case* (1882) 23 Ch.D. 440.
[17] At p. 418.
[18] It seems a little unfair to characterise this result as Lord Wright does in his *Legal Essays and Addresses*, at p. 2, as "a sort of rough justice in the form of a tracing order"—the equality of abatement was due not to roughness but to the equality of the rival equities.
[19] [1914] A.C. 398, 452.

attack was impossible. Lord Dunedin's assertion of the identity of an action for the recovery of chattels and of money has already been quoted; but this approach was not allowed because, owing to the mingling and the insufficiency the lenders' money was in this case no longer identifiable [20]—it was not that money by nature never is identifiable. But it is noteworthy that as illustrative of the consequences *in equity* of such mingling Lord Sumner cited [1] two cases *at law* in which the owners of tallow [2] and bales of cotton,[3] inextricably confused in the one case by melting and running together, and in the other by sea damage obliterating the distinguishing marks, were held to be tenants in common of the mixture in proportion to the original contribution of each. The reason why in spite of this the common law remedy was denied lies in the words:

> "Analogous cases . . . with regard to chattels . . . differ . . . because the property in the chattels remained unchanged, though identification and even identity of the subject-matter of the property failed, whereas here . . . the term property, as we use that term of chattels, does not apply." [4]

And with this must be read the oft-quoted remark concerning the action for money had and received and its congeners, that "all these causes of action are common species of the genus Assumpsit." [5] Lord Wright in the *Fibrosa* case pointed out [6] that the remark "was not necessary for the decision of the case," but it does show very precisely what the House meant by saying that there was no remedy at law: they meant that there was no remedy on an Assumpsit—the only part of the common law to which their Lordships' attention was directed. But before the rise of Assumpsit there would have been a clear remedy in Debt for which a contract supplied only one of the possible justifications; and in Debt it was not true to say that "the term property, as we use that term of chattels, does not apply," for the form of writ was exactly parallel to that of a Writ of Right and also a Writ of Detinue.

Let us see how the matter goes on that basis. The fundamental fact is that an artificial person does not receive property or money whose receipt is beyond its powers,[7] for it can receive nothing save by its agents, and its agents have no authority, real or

[20] Otherwise if even the proceeds are identifiable: in *Taylor* v. *Plumer* (1815) 3 M. & S. 562, Lord Ellenborough allowed the owner of converted money to recover what had been bought with it.

[1] At p. 459.

[2] *Buckley* v. *Gross* (1863) 3 B. & S. 566, 574.

[3] *Spence* v. *Union Marine Insurance Co.* (1868) L.R. 3 C.P. 427.

[4] [1914] A.C. 398, 458.

[5] At p. 452.

[6] [1943] A.C. 32, 64.

[7] Lord Sumner said at p. 453: "the depositors' money was not had and received by the society but by its officers . . . The society has the proceeds, or rather the liquidator has them, in that sense of possession which is necessary . . . for the purpose of the winding up, but it has not got them and there is no receipt of them in the sense which is necessary to raise

ostensible,[8] to receive beyond its powers. The money received by the directors may be applied in the discharge of its pre-existing just debts, when it will be estopped from pleading the lack of authority,[9] or it may be inextricably confused with its own money, in which case the lender will be able to demand, exactly as if the confusion had been of chattels, that an equal amount be apportioned to his contribution, subject, if there is a deficiency, only to a proportional reduction—as indeed would be the case with melted tallow of which some had perished.

The other relevant incapacity is infancy. Lord Dunedin[10] regarded this as another aspect of the same question, but it differs in that an infant does receive the money lent to him, and is therefore prima facie liable in Debt to repay it. But here there is another intervention of public policy, to the effect that an infant shall not be enabled, however innocently, to squander his estate. Lord Kenyon[11] allowed a master to recover in Assumpsit from his apprentice money had and received by the latter as his master's agent and embezzled. He said "that infants were liable to actions *ex delicto*, though not *ex contractu*, and though the present action was in its form an action of the latter description, yet it was of the former in point of substance."[12] In the matter of a loan too, if the money has been paid into the infant's account with a bank, and his general balance has never fallen lower than the amount of the loan—still more if it was lent in cash and the infant still has the same cash—it would presumably be possible to recover it. If any such remedy *in rem* had been available to the lenders in *Leslie* v. *Sheill*[13] they might have been more successful.

Summary

In brief, in order to expose the underlying reasonableness of English law on this subject, the decisions must be grouped under the three following rules:

the implication of a promise to repay that would bind the society." It was presumably in this sense of possession that on pp. 458–459 he treated the competition as being between shareholders and depositors for money in the society's hands: the rest of the House agreed with the quotation above in treating the competition as being between the society and the depositors to money which had been in the hands of the directors.

[8] Here perhaps is the real meaning of Lord Sumner's remark at p. 452 that the depositors could not rely on mistake because they had notice: they could not rely on it as against the Society, for they had notice of the lack of authority, but they could rely on it as against the directors on the principle of *Kelly* v. *Solari* that a careless mistake is nevertheless a mistake.

[9] *Re Cork & Youghal Ry.* (1869) L.R. 4 Ch. 748. Lord Parker of Waddington in *Sinclair* v. *Brougham* [1914] A.C. 398, 441, left it open whether the borrowing was "validated" or the lenders subrogated. Munkman (p. 79) prefers subrogation.

[10] [1914] A.C. 398, 434.

[11] *Bristow* v. *Eastman* (1794) 1 Esp. 172, approved in *Re Seager* (1889) 60 L.T. 665, and in *Cowern* v. *Nield* [1912] 2 K.B. 419, 423.

[12] This is the answer to Kennedy L.J.'s doubts in *Leslie* v. *Sheill* [1914] 3 K.B. 607, 621.

[13] [1914] 3 K.B. 607, 621.

(1) A defendant guilty of wronging the plaintiff twice, the second wrong being a refusal to redress the first, cannot complain if the plaintiff credits him with a rightful action in place of the first, and consequently sues on the second only, under a different complexion, as an original wrong.
(2) A man receiving a benefit from another must pay for it, unless the benefactor forced it on him without request or necessity.
(3) A man taking property, including money, without the owner's free consent must restore it, as must a man keeping property, including money, after the owner's consent has ceased or if the transfer of ownership to himself has been defeated.

It is some recommendation of this breaking down of quasi-contract into three groups that it partially reconciles the conflicting views of its nature: the theory of an imputed (rather than an implied) contract is in the main a procedural device to extend the scope of Assumpsit, but it does account for most of the estoppels; the word quasi-contract is well adapted to the second group, since these obligations are far more frequently than not fixed by some real contract; and the American term Restitution covers the third group. None of these three views, it is submitted, will fit all that is usually included in quasi-contract, but each is appropriate to a part.[14]

But in order to redeem the promise with which this article started, to link the groups with orthodox branches of the law, it is necessary to go further than fitting them to rival explanations. The estoppels can be equally well assigned to Estoppel as a self-contained branch of the law, or, where a contract is what the defendant is estopped from denying, to Contract. The second group must also go with Contract, not because it is part of Contract, but because Contract is part of it: it should indeed come at the beginning of a book on Contract, and not as an embarrassed appendix at the end. The third group, if it is not to form a new chapter of the law entitled Restitution, along with disturbances to the possession of land or chattels should be included with them in Tort.

J. A. Clarence Smith.*

[14] It is true that *aequum et bonum* and unjust enrichment cover all three, but they cover also most of the rest of the law.

* District Judge of Eritrea.

INTENTION, AND KNOWING THE NATURE AND QUALITY OF AN ACT

Was the accused "labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing"? This is an important question in the criminal law. But this test of insanity laid down by *McNaghten's* case [1] has not been confined to crime. It has been extended to cases of divorce for cruelty and recently to tort as well.[2] Curiously enough, in spite of the importance of the formula "know the nature and quality of the act," its precise meaning is far from certain. Nor is it clear to what extent one may intend an act and yet not know its nature and quality. In *Morriss* v. *Marsden*,[3] where insanity was unsuccessfully raised as a defence to an action for assault, Stable J. seemed not to differentiate between intending an act and knowing its nature and quality. If, before one may be said to intend an act, one must know its nature and quality, there would scarcely be any need for the special McNaghten test. Hence we shall attempt to point out some differences between intention and the McNaghten formula and then discuss the larger significance of both tests.

That to intend an act it is not necessary to desire it as well was pointed out long ago by both Bentham and Austin.[4] The confusion caused by speaking of intention in terms of desire [5] will now be dispelled, it is hoped, by the recent case of *Lang* v. *Lang*,[6] a petition for divorce for constructive desertion. On the question whether the husband intended to desert his wife by, in effect, driving her from the matrimonial home by his cruelty, Lord Porter first asks, "What, then, is the legal result where an intention to bring about a particular result . . . co-exists with a desire that that result should not ensue?" (p. 773). He then supplies the answer:

> "If the husband knows the probable result of his acts and persists in them . . . that is enough, however passionately he may desire or request that she should remain. His intention is to act as he did, whatever the consequences, though he may hope and desire that they will not produce their probable effect."

[1] (1843) 10 C. & F. 200.
[2] *Morriss* v. *Marsden* [1952] 1 All E.R. 925; [1952] 1 T.L.R. 947. *White* v. *White* [1950] P. 39.
[3] *Supra*, note 2.
[4] Austin, *Lectures on Jurisprudence*, Lecture XIX; Bentham, *Principles of Morals and Legislation*, Chap. VIII, para. VI.
[5] *e.g.*, Kenny, *Outlines of Criminal Law* (Turner ed.), p. 27.
[6] [1954] 3 W.L.R. 762.

When we say we intend to do an act we usually mean that the act is the objective or purpose towards which our conduct is directed. But this is not necessarily so, for a result is intended, as *Lang* v. *Lang* demonstrates, when we determine to act foreseeing that that consequence is highly likely, *i.e.*, virtually certain, to follow from our conduct. There are some exceptions to this rule. In defining an offence, the legislature may require an act to be done with a specific intent. Then it might be necessary to prove that the accused acted with a particular objective in mind.[7] But generally this is not necessary, and knowledge of certainty of consequences would be sufficient to establish the intent.[8]

It would seem that insanity may be sufficient to negative a man's knowledge of the nature and quality of his act, and yet not be sufficient, in the same situation, to negative intention. Stephen gives the example of a person who cut off a sleeping person's head because "it would be great fun seeing him look for it when he woke up."[9] It seems clear that the decapitation was intentional. But could the accused be said to know the nature and quality of the act? A similar case is where a man cuts an asthmatic's throat "to help him breathe." With these preliminary examples in mind we shall now examine the McNaghten rule.

In *R.* v. *Codere*[10] Lord Chief Justice Reading discussed the meaning of "nature and quality."

> "It is said that 'quality' is to be regarded as characterising the moral, as contrasted with the physical, aspect of the deed . . . The court is of the opinion that in using the language 'nature and quality' the judges were only dealing with the physical character of the act. . . ." (at pp. 26–27).

It should be noted that Lord Reading does not say that the two words mean the same thing, but only that they both relate to the physical nature of the act. His words do not support the view of Asquith L.J. in *White* v. *White*[11] that *R.* v. *Codere* held that "nature" and "quality" are synonyms.

It has been recently suggested[12] that, while "nature" and "quality" refer to physical facts, the meaning of the words is not, in fact, the same. "Nature" refers to the act itself. "Quality" refers to the sort of physical consequences to which it may be expected that the act will give rise. However, the cases draw no such distinction, nor is it easy to distinguish between "act" and "consequence." The "act" of decapitation, in Stephen's

[7] See *R.* v. *Steane* [1947] K.B. 997. See also *R.* v. *Ahlers* [1915] K.B. 616, and Glanville Williams's discussion, *Criminal Law*, s. 13.
[8] Williams, *ibid.*
[9] 2 Hist.Crim.Law 166. Stephen treats this an an example of a person not knowing that what he was doing was wrong.
[10] (1916) 12 Cr.App.R. 21.
[11] *Supra*, note 2.
[12] Ellenbogen, 1 J. of Crim.Sc. 178, 196–197. See also Davis, 4 J. of Crim.L. 75, 86.

example, leads to the "consequence" of death, but is itself the "consequence" of moving the knife. Whatever the position before *R.* v. *Codere*, it is uncertain if any useful distinction can now be drawn between "nature" and "quality."

The *Codere* case imposes a serious limitation on the meaning of the nature and quality of the act. The effect is to exclude a consideration of the accused's appreciation of the moral or social nature of his act under the first part of the McNaghten rules. Since it is established that "wrong" means "legal wrong,"[13] consideration of these factors would seem to be shut out under both limbs of the McNaghten rules.

If "nature" and "quality" are not distinguishable, what, then, does the phrase mean as a whole? Lord Cockburn C.J. once remarked[14]: "What is meant by 'the nature and quality of an act' I really do not know." Such candour is not always found. The Director of Public Prosecutions, in the Report on Capital Punishment (1953), said[15]:

> "The advantage of the words 'nature and quality of the act' is that they are elastic. They can be construed narrowly or widely. The McNaghten rules leave the jury untrammelled to use their common sense in looking at the facts of the particular case to decide whether the accused should be held criminally responsible for his actions."

But such statements as these should not lead us to conclude that the phrase means nothing to the jury or is devoid of any reasonably clear meaning. It has been shown by a distinguished American writer that the formula is not unlike a criterion of normality used by psychiatrists, *i.e.*, "the correctness of reality-testing."

> "The 'reality-principle' has been defined in almost the very words of the legal rule, as 'the apprehension of the true nature of the object.'"[16]

Hence it would appear that the McNaghten test determines not merely if the consequences were *intended*, but if there was a rational understanding of those consequences that were intended. "Understanding" in this sense refers not to social or moral qualities of the act, but rather to the appreciation of the physical characteristics of the act done and of the material circumstances in which it occurs. (It would appear from the decision in *White* v. *White*[17] that "know" and "understand" in this context mean the same.) This appreciation of physical reality must extend to all the circumstances that are required to make the act a criminal one. Applying the rule to Stephen's example, or to a case where a person cuts off another's arm under the physical

[13] *R.* v. *Windle* [1952] 2 Q.B. 826.
[14] Letter to Att.-Gen. on Draft Code of 1879, quoted (1943) Can.B.R. 431.
[15] Para. 233.
[16] Hall, *Principles of Criminal Liability*, 502.
[17] *Supra*, note 2.

delusion that it would grow on again, insanity would not negative the accused's foresight of consequences so much as his rational understanding of the physical significance of those consequences. Objection may be made that in Stephen's example, if the accused were prosecuted for murder, the death of the victim may not have been a consequence foreseen by him, and hence was not even intended. But the accused might think that dead men walk and continue in a sort of earthly state. Thus, assuming death was actually intended, the nature of the act would nonetheless not be known. The same reasoning applies to a prosecution for criminal battery, where, although the consequences are foreseen, *e.g.*, a severed arm, yet it can hardly be said that the accused knew what he was doing if he thinks the arm will grow back on again.

The above analysis finds support in the following instruction of Dixon J., in *R.* v. *Porter*[18]:

> "In a case where a man intentionally destroys life he may have so little capacity for understanding the nature of life and the destruction of life, that to him it is no more than breaking a twig or destroying an inanimate object. In such a case he would not know the *physical* nature of what he was doing." (Italics supplied.)

This instruction by Dixon J. provides a much needed flexibility. It allows the jury to examine whether the accused's understanding of physical reality was so far different from that of an ordinary man that it could be said that he did not know what he was doing. Thus a man who intentionally kills may not know what he is doing if he cannot distinguish between the significance of the animate and the inanimate. The accused may destroy life or wound, thinking he is conferring a benefit on his victim. In the recent case of *Palmer* v. *Palmer*,[19] Lord Chief Justice Goddard recalled a case where a man wounded his wife with a knife under the delusion that he was performing a surgical operation. He at first says that the accused knew the nature and quality of the act, but in a later passage he suggests that:

> "It might be said that he did not know the quality of the act, but . . . the case turned largely on the fact that he believed he was doing his wife a service" (at p. 495).

If the accused knew in this case that he was breaking the law, it would be most important to establish that he did not know the nature of his act. Under a charge for criminal battery or unlawful wounding a broad test such as that of Mr. Justice Dixon would be most helpful in distinguishing between mere foresight of and a rational understanding of the facts constituting the crime.

Glanville Williams, in *Criminal Law*,[20] suggests that a man may not know the nature and quality of his act, if he is mistaken

[18] (1933) 55 C.L.R. 182, at 188.
[19] [1954] 3 All E.R. 494.
[20] s. 95 (b).

as to the nature and quality of any circumstances that go to make up the *actus reus*. Thus if the accused erroneously believes he is killing in self-defence, or that he is an executioner executing judgment, he states that the mistake may be said to be of the nature and quality of the act, *i.e.*, he does not know he is committing the *actus reus*. (Of course the above examples might also come within the "partial delusion" rule of *McNaghten's* case,[1] but this might not always be so. See below.) This broad interpretation of *actus reus* allows the jury to examine the accused's understanding of all factors necessary to establish the criminal act.

But it is clear that in the above cases, on Professor Williams' analysis, the accused cannot be said to *intend* to commit the *actus reus*. For "the principle is that where a circumstance is not known to the actor, his act is not intentional as to that circumstance."[2] On this analysis the scope of the first McNaghten rule becomes largely coincident with intention. If the accused intends to commit the *actus reus*, then he knows the nature and quality of what he does.

It would also seem to follow from Professor Williams' analysis that in all cases where the accused knows the *actus reus* is being committed, any mistake or misunderstanding of his cannot be said to affect the nature and quality of the act.[3] But we have shown by examples given earlier, and Mr. Justice Dixon was to like effect, that the accused may know the *actus reus* is being committed, and yet it may be doubtful if he really grasps the true physical significance of his act. The accused might not only err as to the simple facts of nature, as in Stephen's example. He might, for instance, believe his victim is Hitler, and hence would know he was committing the *actus reus*. He would not come within Professor Williams' analysis, nor could he rely on the "partial delusion" test of *McNaghten's* case, as the identity of his victim would not here be legally relevant. Yet it is at least doubtful if the accused here knows the nature and quality of his act.

If the above analysis is correct, the McNaghten rules provide a wider test than is found in the ordinary concept of intention for estimating the degree and nature of the accused's knowledge. The "nature and quality" test provides us with a purely cognitive test, while the whole search undertaken when we examine a man's intention is not simply into the realm of cognition, but into the realm of "willing" and "determining" as well. But both are also tests of a man's knowledge. We insist, it would seem, that men must know the consequences of their acts (or the situation be such that they ought to have known) before we are ready to fix them with criminal responsibility; and we must, it seems, assume that the reason for this lies in the fact that if consequences

[1] Williams, *Criminal Law*, s. 98.
[2] *Ibid.*, s. 38.
[3] *Ibid.*, s. 95.

are not known or knowable, there can be no duty to avoid them. A choice to avoid a given result presupposes knowledge, actual or potential, of that result. Aristotle pointed out long ago [4] that by the voluntary we mean things in a man's own power that he does with knowledge. Although this is not the place to enter into a broad jurisprudential analysis, it would appear that in the case of both sane and insane defendants the law undertakes an examination into the realms of a man's cognition in the last analysis in order to determine if he has voluntarily done the alleged act. Although there is much in the law that might seem inconsistent with this principle, there would appear to be no other explanation for the rule that there is generally no liability in the criminal law unless the accused has a knowledge of the facts that constitute the crime.[5]

A. E. Gotlieb.*

[4] *Ethics*, Bk. III, Chap. 1; Bk. V, Chap. 8.
[5] See also Stephen, *History of Criminal Law*, II, 100.
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MENS REA IN CONSPIRACY

X AND Y plan together to kidnap Z. The former intends to carry out the project; but Y, unknown to X, has no such intention, although his language and actions lead X to believe he has. Indeed before the plan is carried out Y informs the police and X is arrested and charged with conspiracy. Can X be convicted of that offence?

The precise problem does not seem to have come before an English court, which is possibly why most English textbook writers are silent on the question, not recognising the possibility of difficulty in this aspect of the law of conspiracy. But Mr. Turner,[1] following earlier editions of Kenny, mentions it in a footnote only to show that the problem exists: for he does not suggest an answer. Professor Glanville Williams, however, comes out strongly in favour of liability.[2]

The majority of the Supreme Court of Canada in the recent case of *R.* v. *O'Brien*[3] took the opposite view. There the trial judge told the jury that, whether or not Y intended to go through with the plan, if in fact he had plotted with X to kidnap Z then X was guilty. The British Columbia Court of Appeal, by a majority, held that this was a misdirection, since it did not leave open to the jury the question whether Y had in fact "agreed" with X so as to produce an indictable conspiracy. The Supreme Court of Canada, also by a majority, upheld the decision that there had been a misdirection and the order for a new trial.

The argument of the majority went in this fashion: Conspiracy is the agreement of two or more to effect an unlawful purpose.[4] Two people cannot agree unless they both intend to carry out the purpose which is stated to be the object of their combination. Therefore there is no agreement, and consequently no conspiracy, where one of the two never intends to carry out the unlawful purpose.

Thus Taschereau J. said[5]:

> "It is . . . essential that the conspirators have the *intention to agree* and this agreement must be complete. There must also be a common design to do something unlawful. . . . I have no doubt that there must exist *an intention to put the common*

[1] Kenny's *Outlines of Criminal Law* (1952) at p. 339.
[2] *Criminal Law: The General Part* (1953) at pp. 520–521.
[3] [1955] 2 D.L.R. 311.
[4] For the purposes of this discussion it is immaterial why the purpose is unlawful and whether a combination to effect a lawful purpose by unlawful means is itself unlawful. Hence the shorter phrase will be used for the sake of simplicity.
[5] *Ibid.* at p. 313: the italics are his.

design into effect. A common design necessarily involves an intention. . . . The intention cannot be anything else but the will to attain the object of the agreement."

And later [6]:

"The definition of conspiracy itself supposes an aim. . . . The intention must necessarily be present because it is the unlawful act necessarily flowing from the intention that the state wishes to prevent."

Rand J. put it thus [7]:

". . . a conspiracy requires an actual intention in both parties at the moment of exchanging the words of agreement to participate in the act proposed; mere words purporting agreement without an assenting mind to the act proposed are not sufficient."

And Estey J. thus [8]:

"[The requisite *mens rea*] can only be found, when conspiracy is charged, if the mental attitude of the parties is such that each possesses a common design or intention to do an unlawful act. . . ."

All three judges relied upon the famous words of Willes J. in *Mulcahy* v. *R.*[9] to show that the common law recognised that a conspiracy necessarily involved not merely a superficial concordance of language and actions but also a concordance of intentions. In other words, although an objective observer surveying the conduct of the parties, including their words, would have said: "These two men have agreed to do something," it was necessary to look at the innermost intentions of the parties to see whether in fact there was an agreement. The test was therefore subjective not objective.

Some cases in Canada,[10] South Africa,[11] and the United States [12]

[6] *Ibid.* at p. 314.
[7] *Ibid.* at p. 315.
[8] *Ibid.* at p. 320.
[9] (1868) L.R. 3 H.L. 306 at p. 317. Willes J. said: "A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means." Estey J. also cited Lord Chelmsford in *Mulcahy* v. *R.* (*supra*) at p. 328.
[10] *R.* v. *Cameron* [1935] 4 D.L.R. 447—Chief of Police not guilty of conspiracy when he fraternised with law violators to detect major crimes since there was no proof of a common agreement as to an unlawful purpose. *R.* v. *Kotyszyn* (1949) 95 Can.C.C. 261—policewoman pretended to be pregnant to trap D. *Held*, no conspiracy to abort since there was no intention to undergo the operation. *But* in *Deur* v. *R.* [1945] Rev.Leg. 225 it seems to have been held that the offence of conspiracy was committed as soon as the defendant promised collaboration to effect a common purpose.
[11] *R.* v. *Harris* [1927] N.P.D. at 347, cited by Glanville Williams *op. cit.* at p. 521.
[12] *Woodworth* v. *State* (1886) 20 Tex.App. 375; *Delaney* v. *State* (1932) 164 Tenn. 432. *Cf. Woo Wai* v. *U.S.* (1915) 223 Fed. 412. Such cases are

would seem to support this view. They can be taken to suggest that, in the words of one American judge,[13] "the union of minds of at least two persons is a prerequisite to the commission of the crime of conspiracy." However, there are other cases (which will be considered below) which suggest that O'Brien was rightly convicted in the first place. Unfortunately the majority of the Supreme Court of Canada did not discuss the problem in the light of all these decisions: their method of approach, it is submitted, assumed the required answer rather than proved or demonstrated it. For if a conspiracy is arbitrarily defined as "an agreement of intentions and not merely of language (the intentions being unlawful)" the answer to the problem is undoubtedly that where there is no such agreement of intentions then there is no conspiracy. But the submission is made that the trouble with this approach is that there was no such finally accepted definition of conspiracy which could be applied automatically to settle so novel a point—which it was from the point of view of the Canadian Supreme Court. Because of this novelty the definition of the crime, *i.e.*, the elucidation of the circumstances in which conspiracy is committed, was the very point in issue in the *O'Brien* case. The definition of conspiracy put forward by Willes J., approved by Lord Brampton in *Quinn* v. *Leatham*,[14] and considered as authoritative by later judges,[15] was not designed to meet a set of circumstances in which the nature of an "agreement" for the purposes of conspiracy was in issue. It was framed to deal with cases where if the facts alleged were proved there was no doubt that the party or parties charged could be found guilty of conspiracy, even if only *one* person was being charged. Since for this reason that definition was not applicable, it is submitted that the proper function of the court in the *O'Brien* case was to help create an applicable definition by settling one more disputed point. To accomplish this, the present writer suggests, a reasonable method would have been to examine cases in which only one person had been charged or convicted of conspiracy, in order to see what results the law had reached and what ideas were behind such results in a situation closely resembling that in *R.* v. *O'Brien*. This, as already indicated, was not done by the majority in the case.

Even the minority were content with resting their decision in favour of a conviction on the ground that there was a definition of conspiracy such that it included the idea of "agreement" and that such "agreement" meant a "declaration of consent" on

usually involved in questions of "entrapment," as to which see further below.

[13] Hough J. in *Feder* v. *U.S.* (1916) 257 Fed. 694; 5 A.L.R. 370 at p. 372.

[14] [1901] A.C. 495 at p. 529.

[15] *e.g.*, in *R.* v. *Brailsford* [1905] 2 K.B. 730 at p. 746; *R.* v. *Meyrick* (1928) 21 C.A.R. 94 at p. 99.

the part of both parties to the alleged conspiracy. Thus Locke J. said [16]:

> " . . . the gist of the offence referred to is the agreement of two or more persons to commit any indictable offence."

And later [17]:

> " Where two or more persons declare their consent as to any act or thing to be done or forborne by some or one of them, it is an agreement in the eyes of the law and the fact that one of the parties agreeing does not intend to carry out his part of the bargain cannot affect the legal nature of the arrangement. On the question as to whether or not an agreement has been made the intention of either party to carry it out is an irrelevant consideration."

In other words, as he went on to suggest, if a declaration of consent would be good enough to found a contract in civil law it is good enough to found a conspiracy in criminal law. The view of Fauteux J. was similar. At one stage in his judgment he said [18]:

> " . . . the law, in civil matters at least, does not allow one party to show that his intention was not in truth such as he made it or suffered it to appear to the other party. That a different view should be adopted because of the criminal nature of the object of the agreement in this case . . . is not only inconsistent with the economy of our criminal law but, in my respectful view, unwarranted under the authorities."

For these two judges, therefore, an objective test of agreement was the only valid one as far as conspiracy was concerned.

Yet the present writer cannot but feel that an approach to a problem in criminal law founded upon an assumption that it involves similar considerations to a problem in the law of contract is unsatisfactory. The suggestion is respectfully made that reliance should have been placed for preference on criminal cases. Of these there are some which seem to suggest that there are circumstances in which one person can be convicted of conspiracy if the other parties to the alleged conspiracy have not been, or could not be, found guilty. There are others which suggest that the manifestation of a desire to combine with others for an unlawful purpose is sufficient to make someone guilty of conspiracy, whether or not the unlawful purpose is attainable or could be committed.

In the first place there are cases which show that, although if several persons are charged with conspiracy and all but one are acquitted the one who has been convicted must have his conviction quashed,[19] nevertheless if only one alleged conspirator is tried he

[16] [1955] 2 D.L.R. 311 at p. 327.

[17] *Ibid.* at p. 329. *Cf.* Tindal L.C.J. in *O'Connell* v. *R.* (1844) 11 Cl. & F. 155 at p. 233.

[18] *Ibid.* at p. 333.

[19] *Marsh* v. *Vaughan*, Cro.Eliz. 701; *Dersly* v. *Dersly*, Style 57; *R.* v. *Grimes*, 3 Mod. 220; *R.* v. *Thompson* (1851) 16 Q.B. 832; *R.* v. *Manning* (1883) 12 Q.B.D. 241; *R.* v. *Plummer* [1902] 2 K.B. 339.

may be convicted, even though the other or others with whom he is alleged to have conspired is or are not tried.[20] This applies whether the other alleged conspirator or conspirators is or are dead,[20] unknown,[20] or immune from prosecution.[1] But it may not apply, according to some American cases, where a *nolle prosequi* is entered against such other conspirator or conspirators.[2] The better view would seem to be that as long as there is no clear acquittal of the other or others the one conspirator who is charged can be found guilty, or as was said in an American work [3]:

> "So long as the disposition of the case against a co-conspirator does not remove the basis for a charge of conspiracy a single defendant may be prosecuted and convicted."

This may be illustrated by a reference to the "immunity" cases. These show that if one party to an alleged conspiracy is not amenable to justice because of some immunity granted by the law, another party to the same conspiracy can nonetheless be liable. Thus in *R.* v. *Duguid*[4] the defendant was charged with conspiring with the mother of a child under fourteen to take the child by force from the possession of its lawful guardian. Section 56 of the Offences against the Person Act, 1861, under which such an abduction is made unlawful, exempted from criminal liability a person who claimed any right to the possession of such a child. Under that exemption the mother in question might not have been liable for the completed offence. (Though she might have been guilty of conspiracy—a point left open by the court.) Nevertheless it was held that the defendant could be guilty of conspiring with the mother to commit the offence. Again in the Canadian case of *R.* v. *Segal*[5] it seems to have been held, though possibly only *obiter*, that a person who conspired with another to commit an offence in circumstances in which that other could not be found guilty because of the technical defence of *autrefois convict* could nonetheless be guilty of conspiracy. In *Beechey* v. *R.*,[6] the Privy Council refused leave to appeal in a case where the defendant had been convicted of conspiring with a man who could not have been convicted himself by the same court because he was not amenable

[20] *R.* v. *Thode* 3 Keble 111; *R.* v. *Kinnersley* (1719) 1 Stra. 193; *R.* v. *Nicols* (1742) 13 East 412n.; *R.* v. *Kenrick* (1843) 5 Q.B. 49; *R.* v. *Ahearne* (1852) 6 Cox 6; *Feder* v. *U.S.* (1916) 257 Fed. 694 (C.C.A.); *Rosenthal* v. *U.S.* (1930) 45 F. (2d) 1000 (C.C.A.); *Rogers* v. *U.S.* (1951) 340 U.S. 367 (S.Ct.).

[1] See cases cited below; and *Berry* v. *Indiana* (1930) 173 N.E. 705.

[2] *Contrast Feder* v. *U.S.* (*supra*) and cases cited therein, which hold that there must be acquittal of the conspirator against whom a *nolle prosequi* has not been entered, with *U.S.* v. *Rinskopf* (1874) 6 Biss. 259.

[3] 97 *American Law Reports* at pp. 1312–1313. *Cf.* Hough J. in *Feder* v. *U.S.* (*supra*): "Provided the acquittal or death of co-conspirators does not remove the basis of the charge one defendant may be convicted of the offence." As to the alleged inconsistency between an acquittal of A and a conviction of B (in England) see Bruce J. in *R.* v. *Plummer* [1902] 2 K.B. 339 at p. 348.

[4] (1906) 75 L.J.K.B. 470.

[5] [1925] 4 D.L.R. 762 at p. 764 *per* Howard J.

[6] (1915) 25 Cox C.C. 217.

to the jurisdiction of an English court in Shanghai. The latter was a Belgian, subject only to the jurisdiction of the Belgian courts in the Chinese city, and bound only by Belgian law, under which the crime charged against Beechey was not an offence. The trial judge had directed the jury to find Beechey guilty if the other man would have been guilty if the English court had had jurisdiction to try him. From this case, and some remarks in the others cited before, it might seem that the liability of a single defendant to be convicted of conspiracy in the "immunity" cases only exists where the immune person would have been guilty of conspiracy had it not been for some technical rule. Hence, it might be argued, those cases do not apply to a situation such as that in the *O'Brien* case, because the whole point at issue was: would the other man have been guilty of conspiracy? It is submitted, however, that the policy behind the "immunity" cases is not to acquit a "morally" guilty person because of a mere technicality which results in the acquittal of someone else.

Applying that policy to the *O'Brien* case it could be argued that since the other man was not charged the fact that he possibly [7] would not have been found guilty of conspiracy if he had been charged was irrelevant to determine the guilt of the man actually charged, *viz.*, O'Brien. For O'Brien had in fact shown by his actions that he was possessed of the intention to commit an unlawful purpose, and it is submitted that an examination of the history and purposes of the law relating to conspiracy shows that the law was designed to catch offenders before they had actually begun to effect the unlawful purpose for which they had combined. The law of conspiracy, in modern times at any rate, it is submitted, is really a part of the criminal law framed to dispense preventive rather than retributive justice. As such it strikes at evil intents rather than evil activities, so that although no actual harm has been caused a crime has been committed by the mere design to commit harm. For, in the words of an American judge, "the law must be practical." [8]

This approach to the problem, it is submitted, is supported by a second group of cases which deal with a different point from the ones discussed above. For some cases, in England at any rate, seem to lay down that a person may be liable for conspiracy notwithstanding that the purpose planned to be achieved was an "impossible" one. This is certainly true of cases where the purpose was impossible of achievement because of physical factors

[7] This is an open point—as Fauteux J. said in the case it was the very point in issue. *i.e.*, whether a mental reservation involved innocence: [1955] 2 D.L.R. 311 at p. 336. If the other man had been a police or other official acting to catch O'Brien he would certainly have been innocent. But since he was not an agent of the police the question is a more difficult one to answer. Presumably he would not be prosecuted; but the fact that he gave evidence alone would not make O'Brien innocent, on the argument in *Berry* v. *Indiana* (*supra*); *aliter* possibly if the Crown had entered a *nolle prosequi* against him.

[8] Crane J. in *People* v. *Rizzo*, 246 N.Y. 334 at p. 337.

of which the conspirators were unaware, *e.g.*, where the conspiracy was to abort a woman who, unknown to the conspirators, was not pregnant.[9] The rationale of such cases would seem to be that the defendant has manifested his desire to do the kind of harm proscribed by the law. In this respect the close connection between the origins, purposes and development of the law of conspiracy and the law relating to attempts to commit crimes is important.[10] It would seem to be clear now that an attempt to commit an "impossible" crime (impossible because of some difference between the state of affairs as imagined by the defendant and the state of affairs actually existing) is punishable. Thus in *R.* v. *Ring* [11] the defendant was convicted of attempted larceny when he put his hand into an empty pocket. Professor Jerome Hall's discussion of this problem [12] shows that the reason behind making such conduct criminal is that in such cases there are "harms of sufficient magnitude to be determinable by legal methods," and that "they ought to be punishable." [13] In other words, the state of the defendant's mind from the point of view of his knowledge and intentions is only relevant to determine whether he intended to commit some social harm proscribed by the law. Ought the same not to be true of conspiracy? [14] The fact that, unknown to a man who wishes to enter a conspiracy to commit some criminal purpose, the other person has no intention of fulfilling that purpose ought to be irrelevant as long as the first man does intend to fulfil it if he can. To quote the words of Mr. Justice Wright [15]: ". . . a person may involve himself in the guilt of a conspiracy by his mere assent to and encouragement of the design, although nothing more may have been assigned or intended to be executed by him personally."

To the objection that one man cannot conspire on his own, which seems to have been the view of the majority in *R.* v. *O'Brien*, the present writer would submit in reply that to say this is to beg the very question in issue. For in one sense O'Brien

[9] *R.* v. *Whitchurch* (1890) 24 Q.B.D. 420; *cf. R.* v. *Bishop* [1918] 1 K.B. 310.

[10] See Stephen, *History of Criminal Law*, Vol. II, at pp. 227–229; Holdsworth, *History of English Law*, Vol. V, at pp. 203–205.

[11] (1892) 17 Cox 491; *cf. R.* v. *Brown* (1889) 24 Q.B.D. 357. At one time this problem was determined otherwise: *R.* v. *M'Pherson* (1857) 1 D. & B. 197; *R.* v. *Collins* (1864) 9 Cox 497.

[12] *General Principles of Criminal Law* (1947) at pp. 117–129.

[13] *Ibid.* at p. 129.

[14] *Cf.* the case of *R.* v. *Delaval* (1763) 3 Burr. 1434, where on a trial for conspiracy one of the parties who was forced to assist in the plot because of his financial relation with another party was not proceeded against. He did not take part in the plot because of ill intention or design, but as a result of compulsion.

[15] R. S. Wright, *Criminal Conspiracies* (1873) at p. 70; *cf. ibid.* at p. 81 where he says: ". . . the concurrence of one person with others in acts done in apparent furtherance of a criminal design may not improperly take the place of an approximation to completion of the design as evidence that the person had fully adopted the design and committed himself to its complete execution."

was alone, but in another he had an ally. The question was: what was the effect of this equivocal situation? The issue is not one of logic but of policy. The indications of other cases and other crimes of a similar origin and nature, in the present writer's submission, are that one man can be guilty of conspiracy without others also being guilty. And it is further submitted that such an approach is justified in that a man who believes he is conspiring to commit a crime and wishes to conspire to commit a crime has a guilty mind and has done all in his power to plot the commission of an unlawful purpose. In *R.* v. *Segal* [16] there could not be a conspiracy because one of the parties to the alleged conspiracy did not know that the planned purpose was criminal. In such circumstances it might be reasonable to hold that no conspiracy exists. But where, as in the *O'Brien* case, both parties know that the purpose is criminal, the fact that one of them does not intend to carry out the plan, so that the purpose is incapable of fulfilment (as long as such impossibility is unknown to the other man), is surely irrelevant, as was the fact, in the case of conspiracy to abort, that the woman was not pregnant, so that the illegal purpose there was incapable of fulfilment.

In this respect the American experience on the subject of "entrapment" or "solicitation" by police and other officials is of some importance. To judge from annotations in the *American Law Reports* [17] there seems in such cases to be a distinction between instances where the criminal purpose originated in the defendant's mind and those where it originated in the policeman's mind. In the first, since it was the defendant who approached the policeman and suggested the criminal activity, a verdict of guilty is sustainable. In the second such a verdict is improper. The first group of cases would seem to show that, since the defendant had a criminal intention to start with, and was only encouraged or watched by the police, he was sufficiently guilty to be convicted. On the other hand, in the second group of cases, since the defendant would never have had a criminal intent if it had not been for the suggestions made by the police, it would be wrong to consider him as a man with a guilty mind.[18] What is important also is that in the first group of cases the fact that the police would have intervened in time to prevent the crime from being committed, so that the purpose of the plot was incapable of fulfilment, does not seem to have meant that the defendant was not guilty of conspiracy.[19]

[16] [1925] 4 D.L.R. 762.

[17] See 18 A.L.R. 146; 86 A.L.R. 263; *cf.* also notes in 44 Harv.L.R. 109, and 28 Columbia L.R. 1067.

[18] *U.S.* v. *Certain Quantities of Intoxicating Liquors* (1921) 290 Fed. 824 at p. 826; *O'Brien* v. *U.S.* (1931) 51 F. (2d) 674; 44 Harv.L.R. 109 at p. 110.

[19] *Cf.* Glanville Williams, *op. cit.* at p. 624, note 12, discussing the invalidity of the "impossibility" argument in *Woo Wai* v. *U.S.* (1915) 223 Fed. 412. That case fell within the second group discussed in the text; hence the "impossibility" argument was unnecessary and possibly wrong.

In conclusion, therefore, it is submitted that there was nothing in previous statements on the scope of the law of conspiracy to prevent the court from holding, on policy grounds, that a man may be guilty of conspiracy even though nobody is actually conspiring to commit an unlawful purpose with him. The real issue in the case of *R.* v. *O'Brien* was not whether the *mens rea* in conspiracy was to be defined in terms of " agreement " or " agreement for an unlawful purpose," but whether it was to be determined by the subjective intention of one party or the objectively determined (*i.e.*, apparent) intentions of two people. This was a question of policy which could have been decided along the lines suggested by other aspects of the law on conspiracy.

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THE LEGAL ASPECTS OF RAINMAKING

Does Weather Matter?

The state of the weather affects everybody and everything more than any other natural phenomenon. It can cause migrations of entire peoples, destroy habitations, cattle and crops. It may determine the sites of cities and the development of communities. Wars may be won through its influence: the Armada was scattered by storms, Napoleon's armies were overwhelmed by snow and ice, and even operation "Overlord" had to be postponed to await less vicious weather conditions.

There can be no doubt as to the importance of the weather in our daily lives, but until recently there was nothing that we could effectually do about it, and we therefore had to content ourselves with measures to deal with the inevitable consequences of natural phenomena: the human element did not affect the problem.

Weather Control—Past and Present

For centuries manifold deities have been invoked to provide rain, prevent storms, pacify the elements and generally to produce more desirable weather conditions.

During the past few decades, however, man has attempted to solve these problems himself, by scientific means. Among the early experiments to produce rain were attempts involving cannons fired at the clouds, which proved fruitless, while a certain measure of fog clearance was achieved, locally, by expensive means such as burning oil.

More recently, experiments with chemicals dispersed from aircraft on clouds or even into the clear air itself, and tests involving electric discharge to produce precipitation, have shown some positive results. In the United States, for instance, silver-iodide crystals were sprayed on clouds at a rate of more than 60,000 billion particles per hour, and it was subsequently claimed that rain was thereby caused to fall on to an area where it would not otherwise have fallen at that particular time. It is believed that law suits involving claims of about £1,000,000 are at present pending as a result of these experiments.

The frequency and the potential range of these rainmaking experiments are steadily increasing, and it is therefore quite possible that fairly large-scale interference with weather conditions may be effected in the near future. It may even be that in due course the balance of natural phenomena to which life on earth has become conditioned may be severely disturbed.

The World Meteorological Organisation, a United Nations specialised agency, recently circulated its 82 member States as to the results of tests carried out in a number of these countries and from the compilation of these reports [1] it is evident that there is now fairly widespread activity in this field.

The Legal Aspect

The immediate effects of the more successful experiments are often likely to be twofold:

(a) Flooding in areas where this would not naturally have occurred at the particular time and/or to that particular extent.
(b) Drought in an area where rain would or should otherwise have fallen.

The ancillary results of such causation or deviation of precipitation may be manifold: damage to houses, stock and crops, interference with industry and entertainment, and more remote effects such as fires, accidents, etc. The amounts which may eventually be claimed by those who have suffered damage thereby might be very substantial indeed.

Redress in England at the present is only possible by recourse to the common law, *i.e.*, by claiming in respect of damage on such grounds as nuisance, etc. It is likely to be difficult to establish some of the more indirect claims based on the more remote causes in spite of the very real damage having resulted therefrom, while on the other hand the "rainmakers" will run very considerable risks of becoming liable to pay heavy damages in respect of the more direct claims, in the absence of appropriate legislation.[2] It will therefore be necessary at some early date to clarify the following points:

(a) The rights of ownership of clouds and other atmospheric formations;
(b) The right to interfere with the course of nature; and
(c) The permissible methods, if any, for such interference, and the limits for such interference.

The problem of "ownership of the air" is well established in law. The Roman rule was: *Cujus est solum, ejus est usque ad coelum et ad inferos.* The Norman interpretation was that man could own the (theoretical) column of air above his land, but not the air itself which freely passed over his land, as this was not under his effective control. This legal theory has to a very considerable extent persisted in English law until today. Land owners can acquire incidental rights to free passage of air to houses and quiet

[1] *Rainmaking—A Study of Experiments.* United Nations Publications–1954–1–22.

[2] In the United States, as the result of legal actions following weather control experiments, several states have introduced legislation regulating these measures. See also Vanderbilt L.R. No. 8, June 1955: "Weather modification legislation" (p. 897).

enjoyment thereof, and they need not tolerate undue interference by trespassing objects such as low-flying aircraft or bullets, but as it was not hitherto thought possible to cause large-scale interference with weather conditions, no protection has been devised against the resultant artificial floods or droughts.

Proposal for Basic Legislation

The present position of almost unrestricted freedom as regards interference with the contents of the atmosphere will require a measure of curtailment similar to that imposed on the free use of the high seas. Desirable as it may be to have only a minimum of legislation restricting human activities, this must not be achieved at the risk of unfair damage to individuals. The use of the air space above land and sea must be intelligently regulated.[3] This should preferably be done before commercial weather control becomes widespread in Europe.[4] The following scheme is intended to provide a workable basis for legislation to meet the case:

National Legislation

(i) All practical work and experiments concerning weather control over U.K. territory and territorial waters to be subject to a licence. The licensing authority should be independent but operate in conjunction with such Departments as the Meteorological Office.

(ii) Any proposed weather control work to be submitted in the form of a Plan to the Authority prior to any practical work being done.

The Plan to specify: The means to be used, the proposed method, area, range, date, names of parties concerned, purpose, anticipated effects (including results of comparable work if available), arrangements for compensation (*e.g.*, insurance).

(iii) Following the grant of a licence and after the work has been carried out the result should be communicated to the Authority.

(iv) There should be penalties for failure to submit a Plan and for work carried out without licence or outside licence terms.

International Conventions

(i) An International Convention to regulate weather control over the open sea, and over the polar regions.

(ii) A Convention to regulate the settlement of international disputes, *e.g.*, by resort to the International Court of Justice.

[3] The air above territorial waters should be included in national legislation.

[4] Commercial rainmaking is at present being carried out in Spain by United States interests, compensation is per quantity of additional precipitation produced.

(iii) A Convention to assimilate national legislation, following the principles underlying other recent attempts to assimilate national laws, such as in connection with the laws pertaining to the Sea, the Air, Drugs, Slave Trade, etc.

Derek H. Hene *

EDITORIAL NOTE

Thomson *v.* Cremin

Professor A. G. Davis of Auckland University College writes to point out that *Thomson* v. *Cremin and Others* (1941) which has now been reported as a note in [1956] 1 W.L.R. 103 was originally reported in 71 Lloyd's List Reports 1. It is stated in the current edition of Salmond on *Torts* that the case is "reported only in the official papers of the House of Lords," and the learned editor indicates that it was only by good fortune that he discovered that such an important decision had been arrived at by the House of Lords. Doubtless as a result of this note it was reported in [1953] 2 All E.R. 1185.

Professor Davis adds that the value of the Lloyd's List Reports is hardly sufficiently realised. The report of *Thomson* v. *Cremin* for example gives the arguments of counsel in full; these do not appear either in the All England or the Weekly Law Reports.

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NOTES OF CASES

An Unusual Claim to British Nationality

It must be rare that a decision on the interpretation of an ancient British statute attracts so much attention all over Europe as did that of the Court of Appeal in *Prince Ernest of Hanover* v. *Attorney-General*.[1] Equally rare must be the spectacle of some four hundred persons of the highest lineage suddenly finding themselves possessed of British nationality regardless of their amount of actual connection with the United Kingdom, which may be so remote as to have been entirely forgotten. If the decision of the Court of Appeal is correct—and it is submitted that it clearly is—then the royal families of Holland, Greece, Norway, Sweden, and Denmark all have British, as well as their own, nationality, to say nothing of the very numerous ex-royal families also affected by the decision.[2] The case also raises more general points as to the interpretation of old Acts, which clearly have a wider scope than merely in nationality matters. The school of interpretation which favours a strict interpretation of enactments, as obviating a judicial usurpation of the legislature's functions, gained here the unanimous approval of the Court of Appeal, while Vaisey J. in the court below clearly leant in favour of letting external considerations affect his approach to the statute.

The plaintiff is a "Prince of Great Britain and Ireland,"[3] the heir-male of George III, and a near relative of the British royal family.[4] In this action he sought a declaration that he is a British subject, relying on the Princess Sophia Naturalization Act, 1705.[5] Section 1 runs: ". . . Princess Sophia . . . of Hanover and the issue of her body and all persons lineally descending from her, born or hereafter to be born, be and shall be to all intents

[1] [1955] 3 All E.R. 647.

[2] The number may be exaggerated, *cf.* the Attorney-General's mention of Belgian and Spanish royalties (barred by s. 2 as Roman Catholic) in argument. (*The Times*, February 17, 1955.) Those born in the United Kingdom, *e.g.*, the Crown Prince of Norway, have also been included though their British nationality does not depend on the 1705 Act. On the other hand, even the issue of non-royal "morganatic" marriages are presumably included.

[3] *Per* Vaisey J. ([1955] 1 All E.R. 746, 748). As Prince Ernest was not penalised by the Titles Deprivation Act, 1917 (though his father and grandfather were), he is still entitled to this style. But Vaisey J. errs in stating that he is still a "Royal Highness." By letters patent of July, 1914, the issue of his parents was given the style of "Highness," a lower style. Hence he should not have been styled in this case as "Royal Highness." Even in Germany, all such prefixes were abolished by a law of June 23, 1920 (*Almanach de Gotha*), but no doubt as *de jure* King of Hanover he may by courtesy use "Royal Highness" there.

[4] His mother is descended from Queen Victoria: his brother has married a sister of the Duke of Edinburgh.

[5] 4 & 5 Anne, c. 4 (or c. 16).

and purposes whatsoever deemed, taken and esteemed natural born subjects of this kingdom, as if the said Princess, and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, had been born within this realm of England, any law, statute, matter, or thing whatsoever to the contrary notwithstanding." Section 2 excludes Roman Catholics from the benefits of section 1. The Prince relied on his undoubted descent from Sophia, who, it will be remembered, was called to the succession of the British throne with the "heirs of her body being Protestants" by the Act of Settlement,[6] and on his Protestant faith. Neither could be denied.

The matter thus became one of pure statutory interpretation: did the 1705 Act mean what it appeared to mean and what the plaintiff contended that it meant, *i.e.*, the provision of British nationality for all Protestant descendants of Sophia *ad infinitum*,[7] or should some limit be placed on its "apparently clear and unambiguous" words, and, if so, what limit? English law has never adopted the Scots rule of desuetude and hence it was not open to argue directly that the Act had been rendered obsolete by lack of recourse to it for centuries.[8] But Vaisey J., while agreeing that this was the general position, was clearly very much impressed by the argument that "there is, I understand, no record of the Act of Anne ever having been put into any practical operation or referred to or relied on or regarded as relevant in any way."[9] He derived from this, it may be assumed, his view that the Act was intended to have a purely temporary affect—a view which he then supported by reference to some words in the Preamble to which we shall return. But first it must be observed that the case of *Duke of Brunswick* v. *King of Hanover*[10] contains two direct references to the 1705 Act, where it was used in argument and mentioned by the judge in surveying the plaintiff's arguments without any contradiction or ridicule. It seems surprising that this reference was overlooked by those engaged in the recent case. But the weakness of any such reliance on a "dead-letter" argument is shown by the fact that it was not at all relied on by the Attorney-General in the Court of Appeal.[11]

[6] As re-enacted in the Acts of Union, 1707 and 1800.

[7] By the British Nationality Act, 1948, s. 34 (3) the 1705 Act was repealed, but by s. 12 all existing British subjects became British citizens of the United Kingdom. This means that the 1705 Act no longer applies to after-born persons. This includes Prince Ernest's own children. But *semble* they could claim under other provisions of the 1948 Act.

[8] The 1705 Act had been overlooked in official quarters, *e.g.*, the Duke of Edinburgh was "naturalised" before his engagement to the Queen on the assumption that he was a Greek citizen. By the 1705 Act he was already British.

[9] [1955] 1 All E.R. 746, 748.

[10] (1844) 6 Beav. 1, at pp. 19 and 34.

[11] *Per* Evershed M.R., 640. *Cf.* Romer L.J. (p. 661): "it is no more permissible, in my judgment, in construing a statute than it is in construing a deed, a will, or any other written instrument, to arrive at a conclusion as to the meaning of the language used in the light of events which happened afterwards."

Vaisey J.'s decision was based on a reference to the Preamble of the 1705 Act, which contains the words " . . . and to the end the said Princess Sophia . . . and the issue of her body and all persons lineally descending from her may be encouraged to become acquainted with the laws and constitutions of the realm it is just and highly reasonable that they in your Majesty's lifetime . . . should be naturalised and be deemed taken and esteemed natural born subjects of England." He used these words to justify his view that the Act only applied to those descendants of Sophia born in Queen Anne's lifetime. As the Court of Appeal pointed out, the first objection to this is that, where the enacting part of the Act is clear, there can be no justification for any reference to the Preamble.[12] Secondly, they expressed the opinion that, even if such a reference to the Preamble was justified, the words relied on did not amount to a clear reference to the matter of who should be naturalised, but only to the enacting of legislation in the lifetime of Anne.[13] The Attorney-General, being thus unable to rely either on the "dead-letter" argument or on the reference to the Preamble favoured by Vaisey J., tried to limit the effect of the 1705 Act by reference to earlier legislation.[14] This was equally unsuccessful, Sir Raymond Evershed M.R. pointing out a flaw in this reference even if adopted, a view expressly adopted by his brethren.[15] The only remaining question was one almost of public policy. Vaisey J. had thought that "an appreciable part of the inhabitants of Europe would be invested without their consent . . . with British citizenship."[16] (Are 400 persons really an appreciable part of 393 millions?) Moreover, he was impressed by the arguments from treason law, *e.g.*, he said in argument, "do you mean to say that the Emperor William II could have been indicted for treason and there would have been no answer to it? There could be no end to this."[17] All this led him to his final conclusion, that the construction contended for by Prince Ernest was "absurd" in its results and thus untenable. Could there possibly be a more compelling illustration of Lord Bramwell's saying "what seems an absurdity to one man does not seem absurd to

12 Evershed M.R. at pp. 651, 655; Birkett L.J. at p. 660; Romer L.J. at pp. 661–662.

13 Another argument (not used) is that the reference to Anne's lifetime is connected with the Act 25 Edward 3, c. 1, by which the sovereign's "children" wherever born are in effect naturalised. "Children" must include grandchildren as the Act was passed in view of the fact that Richard, heir to the throne, was born at Bordeaux. If by this older Act the "children" of Sophia would any way have been naturalised by her accession, the words "in your Majesty's lifetime" clearly mean "instead of allowing the Law of Edward to take its course." After the lifetime of Anne there would be no need of naturalisation.

14 4 & 5 Anne, c. 14, repealing *pro hac vice* the requirements of 7 Jac. 1, c. 2. As this argument did not prevail, it seems unnecessary to go into the details here.

15 At pp. 653, 659, 662.

16 [1955] 1 All E.R. 751.

17 *The Times*, February 17, 1955.

another"[18] than the fact that none of the three members of the Court of Appeal could see anything absurd in an Act giving British nationality to all those who might eventually inherit the British Crown? Our conclusion must be that the Court of Appeal is right in rejecting any attempt to cut down the very clear words of the 1705 Act. If it yields inconvenient results, the remedy is to move Parliament to repeal it,[19] not to distort it by relying on methods which can be said to amount to judicial legislation. The recent case may be well seen as a vindication of the principle of the Separation of Powers. Once the courts embark on the uncharted sea of "free" interpretation the most basic assumptions of our Constitution are endangered.

It is significant that no attempt was made to argue that the 1705 Act was void, as being contrary to international law. Vaisey J. might have relied on the view that Parliament can not effectively legislate for persons resident outside the jurisdiction, but in fact the Hague Convention of 1930 on certain questions relating to the conflict of nationality laws expressly recognises that it is for each State to decide according to its own law who are its nationals.[20] Although there are limits to this, *e.g.*, it must not be capriciously exercised,[1] the present case is not at all capricious but an exercise of that grant of nationality based on descent which many Continental nations use. If any Swiss man's male issue *ad infinitum* have Swiss nationality, why should not those in remainder to the British crown have United Kingdom nationality *ad infinitum*? In any case, it must be confessed, the clear words of an Act must be applied by British courts regardless of their non-compliance (if any) with international law.[2]

Some commentators[3] have suggested another way in which the 1705 Act may not in fact apply to many living persons. This argument is based on the assertion that—apart from the House of Hanover[4]—the marriages through whom they claim were not valid

[18] *Hill* v. *East India Dock* (1884) 9 App.Cas. 448, 646; cited by Lord McMillan in *Altrincham Electric Co.* v. *Sale U.D.C.* (1936) 34 L.G.R. 215, 235. Vaisey J. called it "little short of ridiculous" (at p. 751).

[19] The Attorney-General has announced his intention of appealing to the House of Lords at the public expense (in any event). Would it not be in the financial interests of the nation to draft a short bill repealing the 1705 Act retrospectively? In view of the unanimity in the Court of Appeal there is grave doubt whether an appeal will succeed, but such a bill would not be opposed, it is believed, especially if Prince Ernest personally was excluded from it.

[20] Article One.

[1] See Oppenheim-Lauterpacht, *International Law*, 7th ed., I, 587, n. 1.

[2] *The Zamora* [1916] 2 A.C. 77; *Mortensen* v. *Peters* (1906) 8 F. *per* Lord Dunedin at pp. 100–101.

[3] *e.g.*, Mr. Dermot Morrah, letter to *The Times*, November 18, 1955; *cf.* Mr. Clive Parry, *Cambridge Law Journal* (1955) pp. 142–146 (rejecting the argument).

[4] Mr. Parry is misinformed. The Prince himself descends through marriages expressly approved, *e.g.*, that of his parents in 1913 was approved in Council by George V. But his own marriage was not so approved: *semble* he relied on (a) his foreign domicile and (b) his exemption through cross-marriages (see my article (1951) 14 *Modern Law Review* 53, 62).

under the Royal Marriages Act, 1772.[5] The idea seems to be that, as the husbands had in some cases British nationality by the 1705 Act, certain marriages were not "into foreign families" as required by the 1772 Act in order to qualify for exemption of issue under that Act. The case of Kaiser William II is quoted: it is said that his mother did not marry into a "foreign family," as her husband was British by the 1705 Act. The latter fact is admitted, but all the rest of the argument is untenable. William II—and, it is believed, all others in point—descended from a far earlier "exempting" marriage, to a true foreigner. But in any case it is not correct to assume that the 1772 Act is in any way connected with nationality. A family will be "foreign" enough if it is domiciled abroad. Moreover, it is clear that in Private International Law the English view is that, not nationality, but the law of the domicile regulates the essential validity of a marriage.[6] For English law to declare that such persons as the Queen of Holland are illegitimate would indeed be "absurd." The 1772 Act, then, can at best only regulate the marriages of those domiciled in Britain. But, as I have shown,[7] all living persons even so domiciled are exempt from the Act on other grounds. My arguments, which have been accepted in some academic circles, but not yet by H.M. Government, are very much strengthened by the *Hanover* case. The Court of Appeal's reasoning, that even old Acts mean what they say, must apply to the clear words of exemption in the 1772 Act with the results which I have indicated. It is time that the Government ceased to rely on the Act, as they apparently still do.[8]

Finally it must be greatly regretted that Vaisey J. cited Burke's *Peerage* as an authority on constitutional legal matters.[9] As I have shown elsewhere [10] the eminence of this genealogical work of

[5] 12 Geo. 3, c. 14; see my article cited in last note.
[6] Dicey, *Conflict of Laws*, 6th ed., p. 758 and authorities cited.
[7] See article cited note 4 *supra*.
[8] *Cf.* Sir Anthony Eden's recent statement in the House of Commons that its repeal is a matter for Commonwealth consultation.
[9] Particularly in connection with the Titles Deprivation Act, 1917. Vaisey J. thought the fact that this Act did not deprive the Hanover princes of their British nationality evidence for the 1705 Act's not applying to them. With respect this is specious, as (a) their more important right to the Crown was not touched; (b) the Duke of Albany (reigning Duke of Saxe-Coburg-Gotha) was also dealt with. He was a British subject through birth in England, yet this undoubted and well-known nationality was not taken away. Vaisey J. also said that he saw no reason why the Prince should want to bring the present action. Since when has the motive of a plaintiff had to be more than a desire to assert his legal rights? In any case the 1917 Act supplies the answer. The "successor" of any deprived peer may petition the Queen to be restored to the Roll of the House of Lords. The Prince may wish to do this and take his seat, which he could not do if an alien. Both he (as Duke of Cumberland) and the Duke of Albany have only recently become entitled to petition, due to the deaths of their respective fathers, during whose lives the peerages were "suspended."
[10] *Journal of the Society of Public Teachers of Law* (1953), 127. Vaisey J. had the misfortune to fall into exactly the trap I warned against in this article.

reference does not make it at all authoritative on legal points. As an example may be cited its statement [11] that the 1705 Act is "dead." How alive it is was demonstrated in the recent action.

C. d'Olivier Farran.

Mortmain in Mortmain

The House of Lords has chosen the easy way out of the mortmain tangle. In *Att.-Gen.* v. *Parsons* [1956] 2 W.L.R. 153; [1956] 1 All E.R. 65, H.L., it was faced with a claim that an assignment to an "unauthorised" corporation of the residue of a term having a mere four years to run was an assurance in mortmain which operated to vest the land automatically in the Crown by way of forfeiture so as to make the Crown liable on the covenants in the lease. The claim was rejected, (Lord Morton dissenting), on the ground that the word "forfeited" in the Mortmain and Charitable Uses Act, 1888, means "liable to forfeiture" and that consequently the land so liable does not vest in the Crown until the Crown takes active steps to enforce the forfeiture. In arriving at this interpretation the House confined itself strictly to the wording of the Statute, so that the decision is not likely to be of much general value. Little could be made of the Act's title, for it describes itself as an amending Act, as well as a consolidating Act. It is true that Lord MacDermott boldly asserts that where one possible construction would lead to "extraordinary results," as here, "the construction which avoids consequences of this abnormal nature should be preferred"; but Lord Cohen insists that "this consideration ought not to affect your Lordships' construction of the Statute," so the two opinions seem to cancel out. None the less, when reading the speeches, including that of Lord Cohen himself, it is difficult to avoid the impression that the "extraordinary consequences" had some influence on the result.

Lord Morton's dissent was also based on the wording of the Act. To him there is no ambiguity in the phrase "shall be forfeited to Her Majesty from the date of the assurance." The passive tense "signifies that something *happens* to the land from the date of the assurance, without any action on the part of any person." Moreover, if the mesne lord's right of entry under section 1 (2) is exercised, "the land shall be forfeited to that lord from the date of the assurance instead of to Her Majesty," and this clearly indicates that there has already been an automatic forfeiture to Her Majesty. With great respect, this conflict could not have arisen if attention had been paid to the purpose for

[11] The writer states that it has been "ignored in practice" and seems to think this renders it obsolete. Yet he overlooks its repeal in 1948 (see my comments in the article just cited).

which the words "from the date of the assurance" had been inserted. In subsection (1) they indicate that the Crown's entry shall defeat all estates or charges created after the date of the assurance as against the Crown. It is necessary to repeat them in subsection (2) in order that such estates or charges shall be defeated as against the mesne lord if in fact he enters. The obvious analogy is to forfeiture for treason, where in order to achieve this precise result the forfeiture was dated back to the act of treason specified in the attainder.

This analogy, indeed, suggests that there would have been no controversy at all if there had been any investigation of the meaning of "forfeited" in the general context of land law. After all, forfeiture is a well-known concept. Until 1870 land was forfeited for treason. Until 1845 a tortious feoffment or a fine by a tenant for life would work a forfeiture. In 1888 many breaches of manorial custom would effect a forfeiture of copyhold land. Then, as now, a lessee would forfeit his land by an act which denied his lessor's title. Then, as now, freehold or leasehold land would be forfeited for breach of an express condition. In all these cases the basic idea is the same: a "wrong" has been committed and a penalty becomes due; the land itself is "the forfeit." And in all these cases the penalty, the forfeit, must be exacted by some positive act, in treason by attainder, in the other instances by entry or action. The act entailing the forfeiture never sufficed in itself to determine the estate. The forfeit became immediately due, but it was the entry or the action which transferred the land. If this were the generally accepted meaning of forfeiture in 1888, it is difficult to believe that Parliament could have used the word "forfeited" with any other connotation.

As this quasi-procedural point was sufficient to decide the issue, it is not perhaps surprising that the discussion of the substantive law was incomplete and inadequate. Two distinct questions were raised:—1. Is the assignment of a lease an assurance of land within the Act? 2. Is the assignment of a lease having a mere four years to run an assurance in mortmain? On the first issue the books are of no direct assistance, for they discuss only the effect of forfeiture on the grant of a lease by a tenant in fee. Under the old Act of 1279 the position here was clear: if the tenant in fee granted a lease in mortmain the chief lord or the Crown could enter the land "and hold it in fee as an inheritance." This did not mean that the subject-matter of the forfeiture was the estate in fee simple, as the Attorney-General appears to have argued. It was the land which was forfeited. When the chief lord or the Crown entered, the tenant in demesne ceased to be tenant, as in the parallel case of escheat. His interest in the land came to an end; in other words, his fee simple estate was determined. But it did not pass to the one exacting the forfeiture. As in

the case of the Limitation Act, there was no "parliamentary conveyance" to him.

All this, however, is not necessarily applicable to an assignment of an existing lease, to which the old Act makes no reference. What, then, would have been the effect in, say, 1880 of the assignment to an unlicensed corporation of the residue of an Elizabethan lease for 999 years having 700 years still to run? Such an assignment would clearly have been within the mischief of the Act. Nor would there have been any difficulty in holding that it involved the buying or selling or appropriating of land, to use the words of the old Act. The problem would have been to apply the machinery of mortmain to the entirely new circumstances brought about by the emergence of the long lease as a proprietary interest in land. It is suggested that the only possible solution would have been to recognise that leasehold tenure is and has been since Littleton's day as much a tenure as socage tenure. The freehold reversioner would thus become a "mesne lord" within the Act and as such entitled to enter for the forfeiture. What, though, if he failed to enter within the year and the Crown entered on his default? Fortunately the old Act in such a case carefully preserved the mesne lord's services and incidents (see Plucknett, *Legislation of Edward I*, pp. 97 *et seq.*), so that the landlord would remain entitled to the payment of rent and to the observance of the covenants. By the express wording of the Act the Crown would hold "in fee" an estate possibly determinable at the expiration of the original term of 999 years, but the emergence of a novel statutory estate of this kind should cause no difficulty to a generation accustomed to the statutory tenancy under the Rent Acts.

Has the 1888 Act changed this old law? Lord MacDermott concludes that the subject-matter of forfeiture is now the estate and not the land, so that on a lease in mortmain to an unlicensed corporation it is the lease alone which is forfeited, a conception which would seem totally foreign to the basic idea of forfeiture. Unfortunately his argument would seem to involve a confusion between the concepts "land," the physical thing, "tenure," the relation between the tenant of the land and his lord, and "estate," the interest of the tenant in the land which he holds. The Act still says it is the "land" which is forfeited, and it is worth noting that while the Act of 1888 defined "land" so as to include "any estate and interest in land," this definition was amended in 1891 by the omission of those words. Lord MacDermott refers to the amendment, but does not discuss this vital omission, an omission which seems designed deliberately to emphasise the distinction between land and an estate in land. Lord Morton, Lord MacDermott and Lord Cohen have further decided that an assignment of a lease is an "assurance of land" at least within section 1 (1) of the Act, but it is difficult to see how this changes the law. An

assurance of land has always been an assurance of land, whether the land is conveyed in fee, granted for a term of years, or assigned for the residue of a term.

The second issue raised—whether the assignment of a lease having a mere four years to run is an assurance in mortmain—produced a conflict of opinion. Both Lord Morton and Lord Cohen agree that it is, though their reasoning is different and in neither case convincing. It would not be unfair to Lord Morton to compress his argument thus:—The Act deals with assurances to a corporation in mortmain; the Act defines "assurance" so as to include all leases; therefore the words "in mortmain" are mere surplusage. Lord Cohen realises that a transfer is not enough; there must be a transfer *in mortmain*. Short leases were not within the old Act because they "were not lands or tenements within the meaning of the statute," but they are brought within the definition of "land" by the 1888 Act. Therefore they are now assurances in mortmain. Apart from the peculiar logic of this argument, which ends by treating the words "in mortmain" as surplusage, thus contradicting the premises, it is difficult to accept Lord Cohen's explanation of the exclusion of the short lease from the Act of 1279. The old cases make it abundantly clear that the short lease was excluded because the short duration of the "usual" lease did not, to use a revealing phrase, lead to the amortisation of the land. The determining factor was the duration, not the legal quality of leases in general. By contrast, Lord MacDermott fully accepts these old cases as indicating the meaning in 1888 of the words "in mortmain," and consequently holds that "though subsection (1) applies to leaseholds, the effect of the words 'in mortmain' is to exonerate the short term." Neither Earl Jowitt nor Lord Porter expressed opinions on this point.

We are thus left in a position of remarkable uncertainty. Technically it is still the law that the transfer to an unlicensed corporation of the fag-end of a lease is an assurance in mortmain, for on this point the *Morelle* cases have not been overruled. But we do not know who, other than the Crown, may enter for the forfeiture. We do not know whether the *grant* of a short lease is now mortmain. We do not know what will be the effect of the entry where the cause of the forfeiture is the grant of an unusually long lease. The whole idea of forfeiture is in the melting pot: Is it the land or the estate which is forfeited? Does forfeiture operate so as to determine estates or to transfer them? And we may be sure that so long as present conditions exist we shall never know the answers, for the effective decision in *Att.-Gen.* v. *Parsons* that forfeiture is not automatic will put an end to all litigation. The dead hand has closed on mortmain. All that remains is to suggest that a short Act repealing Part I of the 1888 Act as a nuisance and an anachronism would do more good than harm.

A. D. HARGREAVES.

The Variation of the Beneficial Interests arising under Trusts for Sale of Land

The problems associated with applications to vary the beneficial trusts of a settlement have again been considered, this time by Danckwerts J. in *Re Simmons' Trusts*.[1] In this case, under a mixed settlement of land and pure personalty by way of trust for sale, A was entitled to a protected life interest with remainders to her children; subject thereto, she had a power of appointment in favour of any husband she might marry for his life, and in default of issue a general power of appointment exercisable by will, with remainders over in default of appointment. At the date of the application A was aged sixty-three and had never married; she asked the court to direct the trustees to vary the settlement by paying her one-half of the settled fund absolutely forthwith, on her releasing her general power of appointment and subject thereto the remaining one-half share being retained by the trustees upon the trusts of the settlement. Danckwerts J. held that under the Settled Land Act, 1925, s. 64 (applied to trusts for sale by the Law of Property Act, 1925, s. 28 (1)), the court could empower the trustees to carry out this transaction, as being for the benefit of the persons entitled under the settlement.

The most striking thing about this decision is that it apparently offers a ready escape to settlors who have found themselves fettered by the decision of the House of Lords in *Chapman* v. *Chapman*.[2] In that case, an application framed within the Trustee Act, 1925, s. 57 and an asserted inherent jurisdiction, to vary the beneficial interests under a similar settlement (*viz.*, a mixed settlement by way of trust for sale) was rejected by the House of Lords. In the present case *Chapman* v. *Chapman* [2] was referred to in argument only and was presumably considered inapplicable. In the circumstances, however, the decision in *Re Simmons' Trusts* [3] must be scrutinised with caution.

There certainly seems to be little doubt that the Settled Land Act, s. 64, is wider in its scope than the Trustee Act, s. 57, though precisely to what extent remains open to question. Section 57 empowers certain "transactions" to be authorised where expedient in the course of the management or administration of any property vested in trustees, whereas section 64 empowers a tenant for life to carry out certain transactions, without restricting him in the exercise of the power to the management or administration of property. The contrast was pointed out by the Court of Appeal in *Re Downshire's Settled Estate* [4] (a section 64 case): "The jurisdiction under the Settled Land Act, s. 64, is in some respects more ample in regard to the subject-matter to which it relates than is

[1] [1955] 3 All E.R. 818. *Sub nom. Re Simmons* [1956] 2 W.L.R. 16.
[2] [1954] A.C. 429 noted at (1954) 17 M.L.R. p. 473.
[3] [1955] 3 All E.R. 818; [1956] 2 W.L.R. 16.
[4] [1953] Ch. 218.

[that under] the Trustee Act, s. 57. If this result is regarded as unexpected, we point out that the language of the two sections is, to a material degree, dissimilar. . . ." [5] By section 64 (2) "transaction" is defined as including "any compromise or other dealing or arrangement." The Court of Appeal in *Re Downshire's Settled Estate* [6] had interpreted this as being wide enough to enable the court to authorise the tenant for life in that case to vary the beneficial limitations of the settlement by a species of family arrangement. This involved (*inter alia*) the surrender by the tenant for life of a life interest in some £700,000 in return for a capital payment of £100,000—a transaction in some respects similar to that proposed in *Re Simmons' Trusts*.[7] Accordingly, in reliance upon this interpretation, Danckwerts J. sanctioned the arrangement.

A material point however, not mentioned by the judge, is that the reasoning in *Re Downshire's Settled Estate* [8] was expressly disapproved by the majority of the House of Lords in *Chapman* v. *Chapman*.[9] "If . . . there is no doubt as to the beneficial interests, the court is, to my mind, exceeding its jurisdiction if it sanctions a scheme for their alteration, whether the scheme is called a 'compromise in the broader sense' [10] or an 'arrangement,' or is given any other name." [11] And again: "Their decisions [*sc.* those of the Court of Appeal] in *Re Downshire* and *Re Blackwell* [12] went too far . . . the present case cannot be distinguished from them." [13] It was denied that there was any power (even *semble* under section 64) to alter or rearrange the terms of a trust instrument, except within very narrow limits, which comprised principally maintenance cases.[14]

The dicta of the House of Lords suggest that a limitation must be placed upon the interpretation of section 64 which does not at once appear from the very general words of the section. In the true interpretation of section 64, "transaction" must be construed *ejusdem generis* with what has gone before, and limited to transactions with the legal estate in the land. It may be noted that the express powers conferred upon a tenant for life by the Settled Land Act are powers appropriate to a legal estate owner

5 [1953] Ch. at pp. 253–254, *per* Sir Raymond Evershed M.R.
6 [1953] Ch. 218.
7 [1955] 3 All E.R. 818; [1956] 2 W.L.R. 16.
8 [1953] Ch. 218.
9 [1954] A.C. 429. (Viscount Simonds, Lord Tucker, Lord Morton, Lord Asquith; Lord Cohen dissenting on this point.)
10 A "compromise" appears to connote a *lis* where there is a true conflict of interpretation. *Cf. Re Powell-Cotton's Resettlement* [1956] 1 All E.R. 60; 1 W.L.R. 23 (C.A.). This was a s. 57 case.
11 [1954] A.C. at p. 461, *per* Lord Morton of Henryton.
12 [1953] Ch. 218.
13 [1954] A.C. at p. 462, *per* Lord Morton of Henryton.
14 [1954] A.C. at p. 466. This, of course, is apart from the special jurisdiction conferred upon the Probate, Divorce and Admiralty Division by the Matrimonial Causes Act, 1950, s. 25.

and section 64 would therefore give power, *e.g.*, to mortgage the settled land for a purpose not within Schedule III,[15] or to lease the land for a period exceeding the limits laid down by sections 41–48. (The "maintenance" and "salvage" cases mentioned by the House of Lords arise from the inherent jurisdiction of the court and not from section 64.[16])

In view, then, of the facts set out above—(1) that the *Chapman* settlement and the *Simmons* settlement were precisely the same in form, namely, a mixed settlement by way of trust for sale; (2) the similarity of the proposals; and (3) that the House of Lords had said plainly that (subject to the exceptions already mentioned) the court had no jurisdiction to alter the trusts of a settlement either under section 57 or under section 64 or under the inherent jurisdiction—the fact that the application in *Re Simmons' Trusts*[17] was framed under section 64 rather than under section 57, would seem to be an insufficient reason for distinguishing the case from *Chapman* v. *Chapman*.[18]

Quite apart however from the question of jurisdiction there remains the further problem of whether section 64 may legitimately be imported into trusts for sale of land. The Law of Property Act, s. 28 (1) provides that "Trustees for sale shall, in relation to land . . . and to the proceeds of sale, have all the powers of a tenant for life and the trustees of the settlement under the Settled Land Act," and prima facie the words "all the powers" mean what they say,[19] and comprise also the section 64 powers.

However, section 64 is confined in its terms to transactions "affecting or concerning the settled land or any part thereof or any other land," and does not, for example, apply to a settlement under the Settled Land Act which no longer comprehends any unsold land[20]; whereas section 28 (1) applies equally to proceeds of sale—and of course, notionally at least, all land held on trust for sale is regarded beneficially as proceeds of sale.[1] Moreover, it is not as if trustees for sale were obliged to go to the Settled Land Act for residuary powers. The very existence of section 57 is at least an arguable reason for saying that that section and section 64 are intended to be mutually exclusive.[2]

Again, although section 64 is confined to land and capital money representing settled land, there is nothing in the judgment

[15] *e.g.*, *Re White-Popham's S.E.* [1936] Ch. 725. *Cf.* also the Settled Land (Courts General Powers) Act, 1943, s. 2.

[16] [1954] A.C. at pp. 454–456, 466, *per* Lord Morton of Henryton.

[17] [1955] 3 All E.R. 818; [1956] 2 W.L.R. 16.

[18] [1954] A.C. 429. The income tax question, though no doubt present to the minds of the House, was not material to the principal issue of jurisdiction.

[19] *Re Wellsted's W.T.* [1949] Ch. 296 at pp. 305–306, *per* Lord Greene M.R.; *Re Simmons' Trusts* [1955] 3 All E.R. at p. 821; [1956] 2 W.L.R. at p. 20, *per* Danckwerts J.

[20] [1953] Ch. at p. 254, *per* Sir Raymond Evershed M.R.

[1] *e.g.*, *Re Kempthorne* [1930] 1 Ch. 268; and *cf.* Settled Land Act, s. 75 (5).

[2] Presumably the line would be drawn as it has been by *Re Leigh's S.E.* (*No. 1*) [1926] Ch. 852 and following cases.

of Danckwerts J. which confines his reasoning to such land and capital money. It is true that he says that "the present application is concerned primarily with the settlement of land" but there is nothing in the judgment which follows which so confines it. In the first place, he is dealing with the beneficial interests which, under the doctrine of conversion, must be taken to be money.[3] In the second, whether or not the doctrine of conversion applies, any variation of the beneficial interests must necessarily affect the whole settlement; the trusts remain altered whatever the character of the property settled. It is difficult to see how a cash payment of one-half of the settled fund can be described as a transaction affecting the land settled rather than the pure personalty. Finally, this was a mixed settlement in which, by one instrument, land and pure personalty were settled together in a single trust. In such circumstances the trust property cannot be severed so as to enable the beneficial interests to be varied or not according to the share into which a particular item fell. Alternatively, if it can be so severed, it would appear that the appropriate share would then carry with it through an indefinite number of mutations, the quality of variability conferred upon it by its character as "proceeds of sale of land."

It may be a matter of small account, but it would seem that, if the decision in *Re Simmons' Trusts*[4] is to be generally accepted, the House of Lords is unlikely to have the opportunity of pronouncing further upon this point in the future.

Hamish R. Gray.

Conflict and Confiscation

It is probably no exaggeration to say that Upjohn J.'s decision in *Re Helbert Wagg & Co. Ltd.* [1956] 1 All E.R. 129 constitutes the most important pronouncement made by the English Judiciary in the year 1955 on the problems of both public and private international law. It raises many points of great interest, only three of which can be touched upon here.

The facts were simple. Under an agreement which the learned judge had no difficulty in holding to be governed by German law and which was made in 1924 English bankers had advanced a sum of sterling to a German company. Repayment was to be made by instalments in sterling in London. Under a German Moratorium Law of 1933 repayment was to be and was in fact made by payments in Reichsmarks to the German Conversion

[3] Subject to the effect of *Bull* v. *Bull* [1955] 1 Q.B. 234 and *Cooper* v. *Critchley* [1955] 1 Ch. 431. If correct, the present case represents another step towards the assimilation of the trust for sale of land with the strict Settled Land Act settlement.

[4] [1955] 3 All E.R. 818; [1956] 2 W.L.R. 16.

Office, a Government Agency. By German law such payments had the effect of discharging the debtor, the amounts held by the Conversion Office being credited to and, within limits, being available for disposal by the lender. At the outbreak of war £174,000 odd was owing, but the full Reichsmark equivalent was paid during the war to the Conversion Office. Did these payments discharge the balance?

It was fundamental to the case of the lenders (who invited the court to answer this question in the negative) that the German Moratorium Law was confiscatory. The reasoning of Russell J. in *Re Schiff* [1921] 1 Ch. 149, 157, 158 could perhaps have led the court to find that as a result of the German legislation a claim against the Conversion Office was substituted for the claim against the borrowers and that, therefore, no confiscation had occurred. However, Upjohn J. made no express finding on the question, but seems to have assumed the existence of confiscation. He thus avoided a decision on a very difficult problem and, consequently, was compelled to answer a variety of equally difficult questions.

The first arose from the lenders' argument that the loan, being repayable in London, was a debt situate here and, according to established principles, could not be reached by foreign legislation. This was an attractive argument (see Mann, *The Legal Aspect of Money*, 2nd ed., p. 366), but it was rejected on two grounds. Relying on an unreported decision of the Court of Appeal, Upjohn J. felt constrained to hold that by reason of the borrowers' residence in Germany the debt, if any, was situate in Germany only. However, there did not in 1933 exist any debt capable of confiscation: the German legislation affected "the contractual obligation, for the matter still rests in contract. It does not seem appropriate to speak of a debt having a local situation until it is payable and can be recovered by suit" (p. 135). Yet a right to payment on a future date is, it is submitted, a chose in action, a right of property and as such must be capable of having a situation for purposes of probate and estate duty, for instance, no less than for purposes of confiscation. The same applies to the right to the delivery of goods sold. That in either case the right does not come within the conception or description of a debt should, perhaps, not be treated as conclusive on the question of the extraterritorial effect of legislation which, *ex hypothesi*, is confiscatory.

The lenders' next argument was that as a matter of public international law the confiscation without compensation of the property of aliens is illegal and that this principle required an English court to deny effect to the German Moratorium Law: see *The Rose Mary* [1953] 1 W.L.R. 246. If in fact a British subject's property was confiscated without compensation an English court might have been expected to be favourably impressed by the lenders' submission. The learned judge poured cold water on it.

In his judgment the well-known, but, in Sir Hersch Lauterpacht's words, "much overworked" decisions in *Luther* v. *Sagor & Co.* [1921] 3 K.B. 532 and *Princess Paley Olga* v. *Weisz* [1929] 1 K.B. 718, which seemed to establish the principle of the sacrosanctity of the foreign act of State, were indistinguishable and "laid down principles of general application not limited to nationals of the confiscating State" (p. 140). Even if the principle of sacrosanctity exists (which is by no means free from doubt), it is very questionable whether it can properly be applied to cases in which an international delinquency has occurred: see (1954) 70 L.Q.R. 181, 197–200; Lauterpacht, (1954) Camb.L.J. 20, and in particular Halsbury (Simonds), *Laws of England* (3rd ed., 1954) vii, 8, 9 where the eminent author states that English law will withhold recognition or enforcement of foreign law when it is "not conformable to the usage of nations." The principle of precedent to which the learned judge adhered with rigidity not only permits but also pre-supposes a process of rational differentiation.

Upjohn J., however, went further by denying that the nationality of the dispossessed owner could afford a material distinction:

> If the principle be true in respect of a State in relation to its own nationals, it must surely be conceded in relation to those persons who, though not subjects of the State, nevertheless bring their movables within its jurisdiction for business or private reasons, or for the like reasons enter into contracts governed by the law of the State and in general enjoy the same benefits and protection and are subject to the same disadvantages and disabilities as subjects of the State (p. 140).

It is quite true that in international law there exists some support for the proposition that nationality as such affords insufficient protection of property rights and that confiscation without compensation of alien property is an international wrong only if it is arbitrary or discriminatory in character; it is possible that this theory was in the learned judge's mind, for he expressly stated, though without further explanation, that he did "not challenge the correctness of the decision in *The Rose Mary, ubi supra*" (p. 139). On the other hand, there is in international law even stronger support for the principle which, *e.g.*, the United States–Panama Claims Commission in *De Sabla's* case, Annual Digest, 1933–1934, p. 241, formulated as follows: "It is axiomatic that acts of a government in depriving an alien of property without compensation impose international responsibility." The enormous material on the problem, which international practice and theory has produced, was not considered by the learned judge. From the point of view of public international law, therefore, his decision does not substantially assist in reaching a solution. From the point of view of English law it is a matter of regret that he did

little to contribute to that progressive development which, in spite of its not altogether satisfactory reasoning, the decision in *The Rose Mary*, *ubi supra*, seemed to inaugurate.

The third aspect of Upjohn J.'s judgment which should be mentioned is his conclusion that there exists no public policy which permits an English court to deny "the right of every foreign State to protect its economy by measures of foreign exchange control and by altering the value of its currency"; this is subject to the significant qualification "that the foreign law is a genuine foreign exchange law" and not passed "in reality with some object not in accordance with the usage of nations" (p. 142), such as "to build up a secret war fund for use against this and other countries some years later" (p. 143). This is in full harmony with the established English approach to the problem, but in view of some heresies which have from time to time been propagated abroad (see *The Legal Aspect of Money*, pp. 355–360) it is satisfactory to find both the principle and the exception so clearly re-stated. Only two comments are required. Curiously enough, the learned judge does not seem to have been referred to *De Beéche* v. *South American Stores* (*Gath & Chaves*) *Ltd.* [1935] A.C. 148, a decision which is really conclusive on the point. To recognise the possibility, and indeed to investigate the existence, of an exception to the legitimacy of exchange control cannot readily be reconciled with that adherence to the principle of the sacrosanctity of the foreign act of State which *Luther* v. *Sagor & Co.*, *ubi supra*, is said to require and which Upjohn J. proclaimed.

As between British creditors and German debtors the legal issues raised in the case under review were to a large extent disposed of by the Agreement on German External Debts of February 27, 1953 (Cmd. 8781). The compromise is prefaced by the following statement:

> The German Delegation was of the opinion that the German debtor was definitively discharged of his debt to the extent of his payments into the Konversionskasse. The creditor representatives, on the other hand, were of the opinion that as a rule such payments into the Konversionskasse would not be recognised as discharging the German debtor under the laws of their respective countries. In their desire to put an end to fruitless legal discussions both parties agreed to seek a practical solution which would permit settlement of the claims of the creditors without unnecessary formalities.

Upjohn J.'s judgment means that three years after the event the thesis propounded by the creditor nations, while still unimpeachable in regard to contracts subject to English law and providing for payment in England, has been considerably weakened.

F. A. Mann.

A Strike Clause and the Hague Rules

Renton & Co. v. *Palmyra Trading Corporation* [1956] 2 W.L.R. 232; [1956] 1 All E.R. 209, C.A. is a difficult case to assess. The plaintiffs lost, but those whom they represented gained their point out of court. A new precedent was created for one of the Hague Rules. So much for the practical aspect. The academic lawyer will probably be attracted by other features of the case. It contributes to the understanding of repugnancy in contracts. It illustrates the drawback of relying on redress through the courts where large numbers of individuals are aggrieved; not until several years after being introduced was an important clause in a bill of lading at last challenged. Finally, and perhaps most important, this case trained a spotlight on the danger of treating fundamental problems incidentally.

The facts were simple. Timber was shipped in the defendants' vessel, the *Caspiana*, from British Columbia to London and Hull. Since both ports were strike-bound when the ship was due the cargo was diverted to Hamburg. The dispute arose over the cost of shipment on to London and Hull, when work was resumed at those ports. According to the cargo-owners this was the liability of the shipowners, but the latter contended that the following clause in the bills of lading exempted them from liability:

> "Should it appear that strikes would prevent the vessel from entering the port of discharge or there discharging in the usual manner and leaving again safely and without delay the master may discharge the cargo at port of loading or any other safe and convenient port. . . . The discharge of any cargo under the provisions of this clause shall be deemed due fulfilment of the contract."

At the trial, McNair J. held that the clause was invalid, first because it was repugnant to the duty to discharge at the port named in the bill of lading as destination, and, secondly, because it constituted an exemption from the shipowner's liability under the Hague Rules, namely, Art. III, 2, which provides that the shipowner shall "properly discharge" the cargo. The learned judge held that it was implicit in this rule that the discharge should take place at the proper port, especially in view of Art. IV, 4, to which Art. III, 2, was subject, and which limited deviation. This obligation, McNair J. held, could not be contracted out of, and this was an additional reason for declaring the strike clause invalid. There is, of course, no reason why the shipowner should not be allowed to discharge the cargo elsewhere if the port of destination is strike-bound, for he clearly has an interest in employing his ship on a new voyage as soon as possible, but in that event the shipowner, according to the learned judge, must bear the cost of warehousing at the substitute port and of forwarding the cargo to its destination. He cannot treat discharge elsewhere as "due fulfilment of the contract."

The Court of Appeal reversed this decision. On the basis largely of cases not referred to at the trial repugnancy was negatived, and it is not proposed to deal with this aspect of the case. Also on the meaning of the words "properly discharge" the court differed from the learned judge. Bearing in mind the object of the Rules, these words, in the opinion of all three Lords Justices, only refer to the handling of the cargo, and have no geographical connotation, referring to the locality where discharge is to take place—an important precedent for the practitioner.

This was really the end of the plaintiffs' case, but Singleton and Hodson L.JJ. gave an additional reason for their construction of the words "properly discharge." The parties, they said in effect, are at liberty to agree on a substitute port in the event of the port of destination being inaccessible because of a strike, for one must distinguish between the scope of the contract and its conditions. The Hague Rules only forbid the parties to vary the conditions fixed in the Act; they do not forbid them to determine the scope of the contract. The agreement on the port of destination, including that on a substitute port, defines the scope of the contract. Therefore, the strike clause, which provides for a substitute port, affects the scope of the contract and is valid.

This reasoning, it is respectfully submitted, is unconvincing, for it is based on a wrong definition of the word "scope." The proposition on which the reasoning is based originates in Carver's *Carriage of Goods by Sea*, 9th ed., 1952, p. 186; books on the general law of contract do not appear to deal with the matter, and yet it is fundamental to the doctrine of legality of contracts.

One of the meanings of "scope," according to the *Concise Oxford Dictionary*, is "end aimed at, purpose, intention." The *Shorter Oxford English Dictionary* defines "scope" particularly as "the intention or tendency of a law; the drift or meaning of a proposal." It is, of course, clear that under statutes such as the Carriage of Goods by Sea Act—and, for instance, the Hire-Purchase Acts—which do not forbid a whole range of contracts outright, but only make a certain manner of performance compulsory, the parties are free to determine the scope of their contract, to express its purpose or aim.

The purpose of a contract for the sale of wheat is surely the changing hands of a certain kind and quantity of wheat. Terms, however, that refer to delivery—for instance, packing—or payment —before or after delivery—relate to the manner of performance. The aim or purpose of a contract or carriage is the carriage of certain goods from one locality to another, and if the contract provides for sea carriage, the parties are normally free to determine these localities. Terms, however, which refer to such matters as the kind of ship in which the cargo is to be carried, to payment of freight or the mode of delivery, relate to the manner of

performance, and a number of these terms have been made compulsory by the Act.

It may often be difficult to say whether any one term expresses the aim of the contract, refers to its scope, or is a condition relating to the manner of performance. In the *Renton* case, for instance, how is one to prove that the term relating to the substitute port is a condition? Agreement on the port of destination is clearly agreement on the scope of the contract. What, then, is the nature of agreement on a substitute port?

The purpose of the contract in the *Renton* case was that timber situated in British Columbia should be made available to the cargo-owners in London or Hull. It follows that an additional agreement on a substitute port, which was also unidentifiable at the time, could not relate to the purpose; if this term did not relate to the purpose of the contract, it must have been a condition, and indeed this substitute port was only agreed on as a means of effecting delivery, as a manner of performance. The cargo-owners only agreed to it as the second-best, because the shipowners insisted. Thus, in the event of a higher court accepting the ruling of McNair J., that the words "properly discharge" mean discharge at the proper port, the strike clause would fall.

Circumstances may, of course, occur in which agreement on a substitute port do relate to the purpose, the scope of the contract. Suppose, for instance, the cargo-owner wants to postpone his decision because of price fluctuations at the time of shipment, and he bargains for shipment, say, "to London or Hamburg, as directed." Then the cargo-owner will have to elect, at the latest, when the ship has reached the spot where the routes to London and Hamburg diverge.

This was, however, not what happened in the *Renton* case. It is fortunate indeed that the Court of Appeal judgment on the scope-condition issue may be regarded as *obiter*; otherwise a precedent would have been created, apt, it is submitted with all due deference, to confuse. The trouble was that this fundamental problem relating to the legality of contracts was dealt with not in a discourse on legality generally, but incidentally, so that the risk of overlooking important factors was considerable.

So much for the academic aspect of the case. The practical value of the judgment has been much diminished by a subsequent move on the part of merchant bankers. Although the clause in question is said to have been in use for many years, bankers seem to have considered its meaning only as a result of the *Renton* case. A report in *The Times* of December 28, 1955, suggests that they did not like what they saw, for they refused to take up bills of lading with this strike clause, since such bills did not indicate the port of discharge with sufficient certainty; after all, this particular strike clause permitted discharge at the port of loading! Shipowners have thus been compelled to drop the *Caspiana* clause, as

it has come to be known, from their repertoire, although the Court of Appeal decision went in their favour.

The business problem arising from strikes thus remains to be solved. As the law stands, it is the shipowners who, though not liable for delay, must bear the heavy cost involved either in not finding alternative employment for their ships or of paying warehousing and forwarding charges. *The Times* report, just referred to, indicates that the interests concerned are considering how an equitable solution can be found.

O. C. Giles.

Flowers Rides Again

A workman entitled to be paid 3s. 9½d., because he had had an advance of wages, was handed a pay packet. When he got home he opened it, and discovered for the first time that it contained £7 3s. 4d., the amount he would have been entitled to had there been no advance. He decided to keep the lot. Lord Goddard and Hilbery J. thought there was no larceny; Stable J. dissented: *Moynes* v. *Coopper* [1956] 2 W.L.R. 562; [1956] 1 All E.R. 450.

The first problem is whether such conduct should be criminal. Dishonest acquisition of property can be anti-social, and on principle ought to be punishable. It mostly is. Where the dishonesty is only slightly anti-social (*e.g.*, when a destitute family steals from a wealthy one) the conflict of policies should be reflected in a mitigated sentence. The same is true in cases where civil remedies are adequate for the protection of property. There seems to be no foundation in social policy for a distinction between acquisition *animo furandi* and *animus furandi* on realising the thing to be worth stealing.

That does not mean the workman should have been held guilty of larceny. Suppose the packet to have contained 3s. 4d. in coins and seven £1 notes. To pay himself 3s. 9½d. the workman must change one of the notes. He cannot be convicted of larceny for doing that if he eventually hands back £6 19s. 6½d. to his employer. Nor could he be convicted of larceny if he handed back only £6, because the 19s. 6½d. change never was the property of his employer. The workman could have changed any one of the notes he pleased, therefore he cannot be convicted of larceny of any one of them. Larceny is an inappropriate charge where a person takes something of which he is only entitled to part. At least in the case of money, the title must pass, the payee holding on a resulting trust as to the balance after satisfying his own claim. The payer's remedy on the civil side is not an action in tort for conversion but a quasi-contractual action for money paid under a mistake, or the equitable action *in personam* à la Diplock. The workman was the employer's debtor, not his bailee.

It is not suggested that a civil law analysis necessarily holds good for the solution of a criminal law problem. Yet there is a certain advantage in community of concept. Moreover it may lead in these circumstances to a sensible criminal law result: that the workman was guilty of an offence under the Larceny Act, 1916, s. 20 (1) (iv) (*b*). Any remaining artificiality is due to the legal fragmentation of stealing.

L. A. SHERIDAN.

EMPLOYERS' LIABILITY

A NUMBER of fundamental concepts in the law of master and servant which, five years ago, seemed permanently set have more recently acquired remarkable fluidity. In *Staveley Iron and Chemical Co. Ltd.* v. *Jones* [1956] 2 W.L.R. 479,[1] which was a case of an employer's vicarious liability to a servant for injury inflicted by a negligent fellow-servant, the House of Lords hardened up some concepts but imparted a penumbra of uncertainty to others. The judgments contained the following important statements of law, of which those in (1) alone formed the *ratio decidendi*:

(1) To meet the situation of an employee who is injured in part as a result of a breach of statutory duty imposed on the employer for the safety and health of his workpeople, a special subjective test of contributory negligence was evolved by the courts and finally established by the House of Lords in *Caswell* v. *Powell Duffryn* [1940] A.C. 152. The test distinguishes between contributory negligence of a workman and excusable lapses of attention due to various subjective factors, including especially fatigue-inducing conditions of employment.

But, in determining the initial liability of a servant for the tort of negligence in *respondeat superior* cases, the standard of care against which the servant's acts or omissions are to be judged is the purely objective one of the "reasonable man" in Lord Atkin's formula. The nature of a servant's liability in negligence for injuring a third party or a fellow-servant, the House of Lords affirmed in *Staveley*, is not to be watered down by injecting into it the idea of excusable lapses of attention drawn from the subjective test of contributory negligence. As Lords Morton and Reid pointed out (at pp. 485, 486), the effect of thus modifying and reducing the standard of care in the tort of negligence would in cases of injury of one servant by another, involve to a considerable degree the revival of the doctrine of common employment.

(2) Lord Tucker was of the opinion that the subjective criterion of contributory negligence should be confined to cases of industrial injury caused in part by breach of a duty owed by the employer

[1] Also reported [1956] 1 All E.R. 403.

under industrial legislation for the safety or health of his workpeople. Lord Tucker added that the subjective criterion was certainly not applicable where one servant is tortiously injured by another in circumstances in which there was no evidence of repetitive work performed under strain or for long hours at dangerous machines (at pp. 492, 493). On the other hand, Lord Reid expressly left open the whole question of the scope of the subjective test (at p. 485). The employment situation which Lord Tucker's dicta left perhaps most subject to doubt is the case of an industrial injury resulting partly from a breach by the employer of one of those personal duties to take reasonable care for the safety or health of his workpeople placed upon him not by statute but by common law.

(3) The House of Lords have now affirmed in *Staveley* that an employer's general liability for the torts of his servants is not personal but vicarious liability. The uncertainty that sprang up especially in the wake of *Broom* v. *Morgan* [1953] 1 Q.B. 597 has therefore been dispersed.

An employer can be vicariously liable only if the servant in question was at least initially liable (at p. 487), but, if the tortfeasor himself may have pleaded a successful defence, will that defence be available also to the employer—as was argued without success in *Broom* v. *Morgan*? Lord Reid left the validity of the rule in *Broom* delicately open (at p. 487), but Lord Morton seemed prepared to overrule it if a similar case were to come before the Lords: in "a case where the liability of the employer is not personal but vicarious . . . if the servant is 'immune,' so is the employer" (at p. 482). *Sed quaere* whether "immune" was intended to refer to lack of initial liability on the part of the servant or to the availability to the servant of a complete defence.

(4) Although the vicariously liable employer does not normally participate in the commission of the tort himself, nonetheless, for legal purposes (more particularly—*semble*—the Law Reform (Married Women and Tortfeasors) Act, 1935), employer and tortfeasant employee are to be treated as joint tortfeasors (at p. 487).

C. Grunfeld.

The Limitations of "A Trade Dispute"

In an earlier article in this journal [1] I drew attention to an Irish case—*Smith* v. *Beirne and Others* (1955) 89 Ir.L.T.R. 24—which seemed to be authority for the proposition that, apart from the "employer *v.* employer" type of dispute, there is yet another kind of industrial situation which is outside the scope of section 5 (3) of the Trade Disputes Act, 1906. This is a dispute between

[1] (1955) 18 M.L.R. 338.

an employer and a union whose members do not consist in " workmen " within the statutory meaning of that term. Confirmation of this view of the law is to be found in another Irish case—*British and Irish Steampacket Co. Ltd.* v. *Branigan* (1956), unreported—which came before Dixon J. in that jurisdiction.

The facts of the case are not without interest. The plaintiff company brought an action against the defendant, who was general secretary of a trade union, claiming an injunction to restrain him and his committee from conspiring to procure breaches of contract. Prior to the events which gave rise to the action, there had been a dispute in existence between the union and a statutory body known as the Carlingford Lough Commissioners. This body was charged with the maintenance of the harbour works in the port of Newry and its approaches, and the case was complicated by the fact that Newry is situated in Northern Ireland. The employees of the Commissioners were members of the defendant's union, as were the members of the crew of one of the plaintiff company's vessels. In November, 1955, this vessel visited the port of Newry, and in response to a direction from the defendant the crew withdrew their labour and abandoned the ship there.

The substantive defence was that a trade dispute existed within the meaning of the Trade Disputes Act, 1906. In reply, the plaintiff company contended that (1) the Carlingford Lough Commissioners were not engaged " in trade or industry " and so their employees were not " workmen " within the Act, and (2) even if this were not so, in order to constitute a " trade dispute " which will confer immunity under the Act, the dispute must be taking place within the jurisdiction of the court. Newry was outside the Republic of Ireland, and so the protection did not apply.

Dixon J., having examined the structure of the Commissioners, as a statutory body, and the offices they performed in relation to Carlingford Lough, took the view that it was impossible to accept the contention that they were engaged in trade or industry; their duties consisted solely in making and keeping the navigation of the lough easier and safer: " even in the ordinary use of language . . . it would occur to very few people that such an activity could be characterised a trade or an industry." Accordingly, their employees were not " workmen " within the meaning of the Act of 1906, and so no trade dispute could exist. He granted the injunction sought and directed an inquiry as to damages.

In the event, it was not necessary to decide the plaintiff company's second contention, *viz.*, that the Act does not apply to disputes arising outside the jurisdiction, and so this question is still an open one. The decision is, however, in accordance with the earlier case, and confirms the restrictive way in which the Act of 1906 has been applied. It is a pity, nevertheless, that such a question should be left to the hazards of judicial interpretation.

V. T. H. Delany.

BULL *v.* BULL: ANOTHER VIEW

WITH some hesitation I venture to suggest that the effect of the Court of Appeal's decision in *Bull* v. *Bull* [1955] 1 Q.B. 234 may not be so farreaching or so disastrous as Miss Latham [1] and Mr. Gray [2] think. The decision, like all other decisions, must be considered in relation to its facts, and of these the salient ones are, in my humble opinion, that the mother had been let into possession with the consent of the son (in whom the legal estate was vested) and that the whole basis on which the purchase of the house had proceeded was that each of them should advance part of the purchase money to provide a house in which both could and should live. When the son married and his wife did not get on with her mother-in-law he, in seeking to evict the mother, was altering the whole basis of the transaction by taking advantage of the fact that the legal estate was vested in him alone to claim that he had the exclusive right of possession. It is, I think, important to note that he was claiming to evict her and not that he was entitled to sell the house in exercise of the statutory trust for sale; if he had been claiming to do this, different considerations might have arisen, though I shall venture to suggest that the result would have been the same.

The clue to the matter lies, it is submitted, in the distinction that Mr. Gray draws between the "purchase" cases and cases where trusts for sale arise under wills and settlements. The court will not order a sale of land in the exercise of a trust for sale if to do so would enable one of the parties to break a contractual obligation: *Re Buchanan-Wollaston's Conveyance* [1939] 1 Ch. 739; or where the motive underlying the application is spiteful: *Re Hyde's Conveyance* (1952) 102 L.J. 58. In both cases the parties were *de facto* in possession and what the court was saying in each instance was that it would not order a sale that would turn them out *in invito*.

It is well settled that beneficiaries under a trust for sale are not entitled to possession as of right, but only at the court's discretion: *Re Bagot's Settlement* [1894] 1 Ch. 177. But where an equitable tenant in common is already physically in possession the court will not let the trustees of the legal estate turn him out as of right, and this is a very different thing from saying that such a tenant is always entitled to possession and can hold up a sale with vacant possession indefinitely. *Bull* v. *Bull* is, it is submitted, no more than an extension of these principles.

Here the court, as Denning L.J. indicated in *Bull's* case, has ample power to deal with the matter under section 30 of the Law of Property Act, 1925. (Such an application would not on the present facts have assisted the son as the court would, it is

[1] (1955) 18 M.L.R. 303.
[2] *Ibid.* 408.

submitted, have refused the application for reasons laid down in *Re Buchanan-Wollaston's Conveyance* and *Re Hyde's Conveyance* or for *mala fides*; see *Re Mayo* [1943] Ch. 302 at p. 304.)

Looked at in this light, and limited to its particular facts, the decision is to be welcomed; for the rest, as the headnote [3] to the report in the *All England* series points out, the Court of Appeal's observations as to proper remedy where beneficiaries disagree and a sale is desired are not intended "to comprehend all courses but relate to difficulties such as are presented by the particular circumstances of the present case." The decision does not give an equitable tenant in common any right to be let into possession; it merely illustrates the circumstances in which such a tenant, already in possession with a co-tenant, cannot be turned out or have the premises sold over his head.

G. A. Forrest.

Judge-Made Crimes in Eastern Germany

In Eastern Germany, as in other Communist States, show trials are staged from time to time to demonstrate whatever the Government is anxious to impress on the public. As a rule, therefore, these trials excite only political interest, but one, held before the East German Supreme Court last January, also brought out something of interest to the lawyer.

Four defendants, three men and a woman, were accused, and duly found guilty, of espionage for the U.S.A. and "enticement" (*Abwerbung*). This is a new term which requires some explanation. The flight of engineers and scientists, but also of skilled workers, to the West has worried the East German Government for a considerable time, and it alleges, possibly with some justification, that many of the men involved flee, not on their own initiative but because West German businessmen and foreign government agencies induce them to break their contracts in the East. This movement, apparently, has been sufficiently substantial to interfere with economic progress in Eastern Germany, for, in the words of one speaker, the flight of the designer of tomorrow's machinery is more serious than the sabotaging of some existing piece of machinery.

Until lately, however, there was no law forbidding this "enticement," let alone declaring it a criminal offence. Espionage, of course, is a recognised crime, but after the last war the relevant provisions of the German criminal code were abrogated by the Allies. The West German Federal Republic enacted suitable new legislation when the occupation came to an end, but Eastern Germany does not seem to have followed suit. However, acting

[3] [1955] 1 All E.R. 253.

no doubt on ministerial instruction, the Supreme Court of the East German Democratic Republic laid down as early as 1952 that espionage is punishable under Article 6 of the Constitution, and now "enticement" has been added.

This Article 6 is the first in the section dealing with the rights of citizens, and its first paragraph proclaims the equality of citizens before the law. The material words of the second paragraph read as follows:

> "Militarist propaganda and incitement to war, and all other acts directed against equality, are crimes within the meaning of the criminal code . . . Anyone found guilty of such crimes shall be disqualified from holding public office . . . and disfranchised."

Since, the court reasoned, espionage and enticement from Eastern Germany are being undertaken to prepare for a future war, they are covered by the constitutional prohibition of incitement to war. It follows that anyone engaging in espionage or enticement commits a crime, and it makes no difference that these crimes are not specified in the criminal code to which the Constitution refers. Nor does failure of the Article in the Constitution to specify the penalty prevent the court from passing sentence. In the present case, two of the defendants were sentenced to death and the other two to terms of penal servitude.

The death sentences were later commuted, although the fortnight between sentence and pardon witnessed a most unusual press and radio campaign in defence of the sentences. Possibly the Government saw that the public—at home and abroad—remained unimpressed—a matter of some political significance.

From the point of view of the lawyer the case arouses interest for other reasons. Here judges have created crimes by construing words in a general law. The defence had contended that the defendants could not be punished, at any rate for enticement, because to do so would give the judicial interpretation of the Constitution retrospective effect; the interpretation had certainly not been heard of at the time when the acts complained of were committed. But this argument was rejected.

Another point of interest is procedural. Nowhere in indictment, evidence or judgment was it suggested that the four defendants or any two of them had known of each other when they committed the crimes, let alone conspired. Nevertheless the four cases were tried together. The ground on which this was done seems to have been that each defendant had worked for the same agency abroad, but the purpose of the joint trial was almost certainly the desire to emphasise the warning to other potential offenders, and to drive home the lesson by the production of a formidable volume of evidence.

A later judgment in a provincial court gave the crime of enticement an even wider scope. The defendant, charged with enticing

two young farm labourers, pleaded that the initiative had come from the latter. They had consulted him on how they could best reach Western Germany, and he had merely helped them as a favour. These facts were accepted, but the court held that the defendant was nevertheless guilty of enticement in that he had failed actively to dissuade the men from fleeing the Republic.

The straining of the words of the Constitution surprises not only because of the lip service that is being paid to the concept of the rule of law but also because it would seem to have been quite unnecessary. When, in 1950, the East bloc States started their "peace" propaganda all of them enacted legislation in similar terms, declaring war propaganda a crime. The East German "Law for the Protection of Peace," of December 15, 1950 (*Gesetzblatt*, p. 1199), provided that "incitement" to war was punishable with imprisonment (s. 2) and in serious cases with death (s. 6). It is hard to see why the East German Ministry of Justice did not draw the attention of courts to this law, which provided for the death penalty. On the face of it this should have made it easier to convince the public of the legality and fairness of the Supreme Court judgment.

O. C. Giles.

The Right to Reject Goods for Breach of Condition

In (1951) 14 M.L.R. 173 Mr. J. C. Smith examined the right of the buyer in a contract of sale of specific goods to reject the goods for breach of condition and he concluded that in a sale of specific goods there is generally speaking no right of rejection at all.[1]

The difficulty centres round section 11 (1) (*c*) of the Sale of Goods Act, 1893, the material parts of which are as follows:

> . . . where the contract is for specific goods, the property in which has passed to the buyer, the breach of any conditions to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

The question posed by this subsection therefore is, when does the property pass in a sale of specific goods? The answer is given by Rule 1 of section 18, which says that, subject to a contrary intention:

> Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.

[1] Subject to a contrary intention.

Most of Mr. Smith's article is concerned with the meaning of "an unconditional contract" within Rule 1. He concludes that this must mean a contract not subject to a condition precedent, and cannot possibly mean a contract which contains no conditions in the sense of essential stipulations, breach of which gives the buyer the right to reject the goods. In reaching this conclusion the learned writer is compelled to dissent from the reasoning of the courts in *Varley* v. *Whipp* [1900] 1 Q.B. 513 and *Ollett* v. *Jordan* [1918] 2 K.B. 41, and also from certain dicta in *Leaf* v. *International Galleries* [1950] 2 K.B. 86. With most of this criticism it is impossible to find fault, but the object of this article is to suggest that there may nonetheless be a way of escape from the unfortunate conclusion to which Mr. Smith felt impelled.

The clue to the difficulty, it is submitted, lies in the words "in a deliverable state" in Rule 1 of section 18. This does not simply mean in such a state that the goods are physically deliverable, because section 62 (4) says:

> Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

Of course if the goods are not physically deliverable they cannot, unless otherwise agreed, be in such a state that the buyer would be bound to take delivery of them,[2] so they are not in a "deliverable state" within section 18, Rule 1.[3] But even if goods are physically deliverable they may not be in such a state that the buyer would be bound to take delivery of them if they did not conform to the contract in some essential particular. The question whether the buyer is bound to take delivery of the goods necessarily imports a problem of law, and cannot be answered simply by reference to the physical state of the goods. This does not mean that "deliverable state" is equivalent to "conforming to the contract description," and in fact it seems clear from section 18, Rule 5, that these are two different things, for this Rule refers to "goods of that description, and in a deliverable state" being appropriated to the contract. But goods may conform to their description without complying with all the implied conditions laid down by the Sale of Goods Act, and if they do not so comply, the question—which is a question of law—will arise whether the goods are in a deliverable state, *i.e.*, whether the buyer will be bound to take them under the contract.

The crucial question with regard to section 62 (4) is whether it is to be interpreted as an exclusive definition or whether it can be interpreted inclusively, in other words, does it follow from this subsection that if the buyer is not bound to take delivery, the goods cannot be in a deliverable state? Although it does not actually

[2] *Cf.* s. 29 (5), which puts the cost of making the goods deliverable on the seller.
[3] *Cf. Kursell* v. *Timber Operators & Contractors* [1927] 1 K.B. 298; *Underwood Ltd.* v. *Burgh Castle Brick* [1922] 1 K.B. 343.

say this, it is submitted that this is the natural inference to be drawn. An interpretation of a clause as inclusive is not possible when it would leave standing the direct opposite of that which is included. Moreover, if the clause is to be interpreted in this way, one would not expect to find the most obvious case of all included and much less obvious cases excluded. It is submitted, therefore, that section 62 (4) must be interpreted exclusively, that is to say, if the buyer is not bound to take delivery of the goods under the contract, then they are not in a deliverable state.

The effect of this subsection, then, is that the question whether the goods are in a deliverable state depends upon whether the buyer is bound to take delivery of them under the contract. In what circumstances, then, is the buyer bound to take delivery of the goods? This question is easier posed than answered because, owing to a most unhappy piece of drafting, the Act appears to create a complete vicious circle. The combined effect of section 18, Rule 1, section 62 (4) and section 11 (1) (*c*) is as follows. In an unconditional sale of specific goods in such a state that the buyer would be bound to take delivery of them the property passes when the contract is made. But when there is a breach of some condition by the seller, the question whether the buyer is bound to take delivery is made to depend upon whether the property has passed to the buyer.[4]

In other words, the question whether the property has passed depends upon whether the buyer is bound to take delivery of the goods, and the question whether the buyer is bound to take delivery of the goods depends upon whether the property has passed. This is no mere academic conundrum but is, on the contrary, a problem which may be raised by the simplest of facts. Indeed, it is submitted that the facts of *Varley* v. *Whipp* should have raised this very question.

The facts of the case were that the defendant bought a second-hand reaping machine which he had never seen from the plaintiff. The machine did not correspond with the somewhat laudatory description given by the plaintiff so that there was a breach of the condition implied by section 13 of the Sale of Goods Act. The question was whether the buyer was entitled to reject the goods or whether he was relegated to his right to sue for damages by section 11 (1) (*c*). The court held that this was not an unconditional contract, that therefore the property in the machine did not pass to the defendant when the contract was made and therefore that section 11 (1) (*c*) did not apply. This reasoning was convincingly criticised by Mr. Smith and it is agreed that the contract was an unconditional contract for the sale of specific goods. But it is submitted that this is not the end of the case. According

[4] *i.e.*, if there has been no acceptance. If the goods have been accepted, these difficulties clearly do not arise.

to the above arguments the court should have reasoned somewhat as follows.

Since this is an unconditional contract, the right of the defendant to reject the goods depends upon whether the property has passed to him (section 11 (1) (*c*)). Upon turning to section 18 to discover when the property passes we find that in an unconditional contract of sale of specific goods (which this is) the property will pass when the contract is made if the goods are in a deliverable state (Rule 1). Upon turning to section 62 (4) to discover the meaning of a deliverable state we find that this means that the buyer is bound to take delivery of them. The vicious circle is now complete, for when we ask whether the buyer is bound to take delivery of the goods, we are back where we started from.

What then is the solution to the problem? Clearly there is no logical answer [5] but it is submitted that some sort of answer may be found on the following lines. While strictly speaking there is no conflict between section 18, Rule 1 (as interpreted by section 62 (4)) and section 11 (1) (*c*), the vicious circle created by these provisions should be treated in the same way as such a conflict would be treated. It should therefore be asked which is the dominant section, which section accords more with the intentions of the Act? To the question as so put it is submitted that there can be only one answer. Clearly, section 18, Rule 1, is the dominant section and accords more with the intentions of the Act. In particular the adoption of this view does not nullify the buyer's right to reject specific goods for breach of condition. It also means that the actual decisions in *Varley* v. *Whipp* and *Ollett* v. *Jordan* can be supported, though the reasoning is open to criticism.

It is consequently submitted that where the goods do not accord with the contract because of the breach of some condition by the seller, the goods are not in a deliverable state, because the buyer is not bound to take delivery of them. Therefore the property does not pass to the buyer on the making of the contract but at the earliest on his acceptance of the goods, and therefore section 11 (1) (*c*) does not prevent the buyer rejecting the goods before he has accepted them. Whatever defects this view may have, it does at least have the merit of treating the buyer's right to reject specific goods for breach of condition as real and not illusory.

P. S. Atiyah.

[5] Of course once the circle is broken either solution is logical, but there is no logical reason for breaking the circle at one place rather than another.

REVIEWS

THE LAW OF TORTS. By HARRY STREET, LL.M., PH.D. [London: Butterworth & Co. (Publishers) Ltd. 1955. lxxxiii and 555 pp. (with index). £2 5s. net.]

THE publication of Professor Street's *Law of Torts* raises hopes that the long reign of Pollock, Salmond and Winfield will draw to a close. This is no disrespect to those great men or to the very able editors who have produced new editions when the master mind was stilled, but the spectacle of an old textbook "dolled up" in order to attract the goodwill won by the original author is not very inspiring. The opinions of Pollock, Salmond and Winfield will long be held in high regard, but they are best consulted as they came from the author's pen, unqualified by doubts and contradictions in text, footnote or excursus.

It can be said at once that Street on *Torts* is a good book, and the second edition (if the author pays attention to his critics!) will probably be a great book. It has two great merits. The first is that the presentation of the subject is orderly, and manifestly orderly: the table of contents shows at a glance how the whole subject has been mapped out into parts, chapters and sections, and the sections themselves are clearly divided into paragraphs and sub-paragraphs, all clearly numbered and lettered and titled; and as these divisions are prominently visible in the text of the book the reader is never in doubt as to the precise point to which the author is directing attention. The other great merit is that the author fully accepts the view that the law of torts is the law to be extracted from the cases, and he accordingly uses the cases as materials from which to derive his propositions. Some earlier books were more given to treating cases as if they were happy illustrations of the principles devised by the author.

Street's general scheme is, after a very few pages of general observations, to go straight to specific torts, classifying them according to the interest of the plaintiff which is invaded rather than according to the nature of the defendant's conduct. It is a manner of treatment which those who teach tort are coming increasingly to adopt, since it is a considerable improvement on the method adopted by Pollock and those who went wandering off with him in search of the mare's nest of a general principle of tortious liability. It has, moreover, the advantage of bringing together, as a general rule, types of liability which derive from the same common law origin, for the common law in its formative period was much more concerned with the protection of the plaintiff's interest rather than with attempting to correct the defendant according to some notion of fault.

The one substantial criticism which may be made is in the treatment of causation, remoteness of damage and contributory negligence. Notwithstanding Street's admission that these topics are relevant to all torts he has chosen to deal with them in that part concerned with negligence. The convenience of this is not allowed, for after all the book is primarily for students, and one short caveat will not prevent the student linking these matters solely with one specific tort. There are already far too many students who, in Winfield's words, regard negligence and contributory negligence as two cards from the same pack with the one trumping the other.

A less serious grievance is the treatment of the action on the case. Perhaps it has been assumed that the student knows all about the legal history of the matter. If he does not he will be very mystified. Under the section "General Considerations" he is told briefly that "the form of action on

the case developed separately for indirect injuries" (p. 7). Later (p. 28) it is implied that the action on the case was developed for the purpose of providing a remedy to chattel owners not in possession, and the chapter on damage to chattels ends with a section labelled "Case" devoted to this matter. Thereafter, scattered through the book are a number of dark allusions to the action of case, and when we come to p. 419 there is a section boldly headed "Action on the Case" which contains merely a few miscellaneous out-of-the-way torts such as *Ashby* v. *White*. It must be all very perplexing to the newcomer.

The book is not entirely devoid of minor heresies. For example, on p. 11 we are told that "a master cannot be sued in trespass for the tort of his servant," and *Sharrod* v. *L.N.W.Ry.* (1850) 4 Exch. 580 is cited in support of this proposition in a footnote where the author suggests that the point escaped notice in *National Coal Board* v. *Evans* [1951] 2 K.B. 861. It is true that as long as the forms of action survived an action of trespass could not be maintained against a master for the trespass of the servant, as *Sharrod's* case lays down clearly. It is equally true that at that time neither could a case be maintained against a master for the trespass of the servant, for the not very satisfying reason that a servant's trespass was regarded as a deliberate act which must lie outside his authority (*McManus* v. *Crickett*, (1800) 1 East 106). But any formal objection vanished with the abolition of the forms of action, and the other objection became valueless after such decisions as *Seymour* v. *Greenwood* (1861) 6 H. & N. 359, and *Limpus* v. *L.G.O.C.* (1862) 1 H. & C. 526 made it clear that a master could be liable for the wilful acts of the servant in the scope of his employment. From that time onward the idea that a master could not be sued for trespass of the servant disappeared, and when Pollock and Salmond came to write their books they failed to notice the present existence of any such doctrine. We should probably have heard nothing more of the matter had not Winfield and Goodhart revived it (without citing any authority) in an article in 49 *Law Quarterly Review* at p. 366 in a passage which is reproduced virtually identically in Winfield's *Tort*, 1st ed., p. 222. It is sufficient answer to this heresy to say, firstly, that it was refuted by the Privy Council in *Goh Choon Seng* v. *Lee Kim Soo* [1925] A.C. 550, and secondly, that if the proposition contended for is true then not only was *National Coal Board* v. *Evans* (*supra*) wrongly decided, but so also were a number of other cases such as *Konskier* v. *Goodman* [1928] 1 K.B. 421 and *G.W.K. Ltd.* v. *Dunlop Rubber Co. Ltd.* (1926) 42 T.L.R. 376, not to mention a whole host of cases such as *Warren* v. *Henlys Ltd.* [1948] 2 All E.R. 935, *Delaney* v. *Smith* [1946] K.B. 393, *Owen & Smith* v. *Reo Motors* (1934) 151 L.T. 274 where a lot of time was spent in discussing matters which were irrelevant since the action must in any event have failed on this ground.

Another heresy is that the common law recognises a defence of necessity in the case of an intentional tort. This runs so counter to the only discernible general principle of tortious liability, namely that the law of torts exists to compensate an injured plaintiff rather than to mulct a guilty defendant, that it cannot be accepted as correct. Nor is there any evident reason in point of justice why a person who finds himself in a perilous position should be permitted to extricate himself gratis at someone else's expense. If, defending myself against a murderer, I save myself by throwing my neighbour's valuable Dresden china in the murderer's face, ought I not to pay for my salvation? No one would dream of applying the defence of necessity in the realm of contract. If I save myself from a pursuing murderer by taking a taxi, of course I must pay for the taxi. Direct authority on the point is negligible. Once we discount mere dicta, cases which are really cases of abatement of nuisance, cases which are really self-defence (for obviously one can plead necessary self-defence against a wrongdoer), and cases dependent on prerogative, we are left with *Mouse's Case* (1608) 12 Co.Rep. 83. *Mouse's Case* certainly held that a passenger in a sinking ferry

boat was justified in throwing a fellow passenger's goods overboard, and it can be best explained on the ground that the King's Bench in 1608 with some vague recollections of the *lex Rhodia de jactu* in their minds thought that Mediterranean maritime law could be applied to the Gravesend ferry.

There are other points where one could differ from the author, especially in those instances where he has assumed a modern rule on the strength of rather ancient dicta. For example, whatever Parke B. may have said in 1853 it is highly improbable that any court today would say that sawing up another's timber is not a conversion (p. 43). Nor, as far as one can see, is there any ground for saying that Lord Atkin's neighbour principle is "more authoritative" than Brett M.R.'s attempt to formulate a general principle in *Heaven* v. *Pender* (p. 113): both dicta shatter on the hard rock of House of Lords authority. Street's acceptance of *Bird* v. *Holbrook* (1828) 4 Bing. 628 cannot pass unchallenged: it was a decision undoubtedly influenced by the fact that by the time the case came to be tried the Spring Guns Act had become law, and furthermore there was evidence of a wilful intention to hurt—the defendant expressly refused to put up warning notices "lest the villain should not be detected." Insofar as *Bird* v. *Holbrook* represents the position at common law it was dissented from in the later case of *Jordin* v. *Crump* (1841) 8 M. & W. 782. And again, though this is perhaps tilting against windmills, Street's ready acceptance of the tort of conspiracy must be questioned. In spite of the plethora of House of Lords dicta it is still extremely difficult to discover a case where a plaintiff got home on a count of conspiracy in circumstances where the acts complained of would not have been actionable if done by one defendant.

But to differ from an author in the realm of tort is not at all to discredit his writing. Ever since books on tort began to be written the subject has been more productive of controversy than any other branch of law, and it is Street's achievement to have written an orderly book which will not confuse the student, but at the same time does not seek to blind him to the difficulties which abound.

F. H. Newark.

They Stand Apart: A Critical Survey of the Problem of Homosexuality. Edited by Judge Tudor Rees and Harley V. Usill. [London: William Heinemann Ltd. 1955. xii and 220 pp. (with index). 21s. net.]

This is a volume of essays, the quality of which is very uneven but which nevertheless provides the general reader for whom it is intended with an excellent introduction to this difficult and important, if unpleasant, subject. Part I consists of essays on the legal, social, and moral aspects of homosexuality: Part II of an essay on the medical aspects—except for the fact that it is longer than the other three put together there is no obvious reason why this essay should have a "part" to itself. Part III contains a summary of the law upon this subject in other West European States. Part IV is a rather miscellaneous selection of extracts from the Parliamentary debates, and from the Joint Report of the Medical Association and the Magistrates' Association on Psychiatry and the Law: it also contains a critical survey of the statistics relating to prosecutions for this offence in Great Britain.

The present interest in homosexuality no doubt has its meretricious and pornographic side, but it cannot be doubted on the whole it is to the advantage of society that a social problem the extent and importance of which had not been suspected even by many well-informed persons should be brought out into the light of day, and made the subject-matter of reasoned discussion. The subject is from most points of view so unpleasant and gives rise to such

strong feeling that the refusal of the mass of the community, until quite recent times, even to admit of its existence, is understandable. The *Wilde* case was, of course, a jolt to the public, but it was possible to regard it as an isolated phenomenon and, as Lord Winterton made clear in his speech in the recent House of Lords debate on the subject, respectable opinion was prepared resolutely to adopt this course. But the clinical material published by Havelock Ellis was beginning to get talked about and from the time of Wilde there has been more and more preoccupation with the problem among those sections of the community who refuse to bury their heads in the sand. Finally, of course, the *Montagu* case brought the general public up against the subject with a bang, and led to the appointment of the Departmental Committee which is at present sitting.

This volume is one of a number which have recently appeared, a fact which in itself is indicative of widespread interest. It contains but few pages about the narrower legal aspects of homosexuality, but this is certainly because the existing law on the subject lies within a very narrow compass. What law it is necessary to know for the purpose of appreciating the subsequent argument is given succinctly enough by Judge Tudor Rees in the first chapter, and even that will be *terra incognita* to many lawyers, since this branch of the law is not discussed in students' textbooks, and is not the concern of the average practitioner. Nevertheless the law is basic to the whole problem, and every sensitive lawyer must feel that the members of his profession are particularly concerned to see that it is not left unreformed any longer.

Indeed one of the big questions is whether the law should concern itself with homosexuality at all, for some doctors go so far as to hold that the problem is entirely medical. It seems unlikely that this view will meet with general acceptance, unless at any rate there are revolutionary improvements in medical knowledge, particularly on the therapeutic side. Indeed the other big question which is that of punishment is, as I see it, closely affected by this very need for a radically improved therapy.

But this, of course, begs the question and assumes that the problem is in fact medical, which outside the medical profession, and even in it, very few are prepared to do. For many informed people take the view that most offenders or would-be offenders against young boys are in fact controllable by the sanctions of the criminal law, just as offenders against young girls are fairly clearly so controllable.

The whole institution of punishment is a matter of perennial interest and importance to lawyers, as indeed it is to the whole community and there is perhaps no better field than that of homosexuality for a study of its various aspects. Punishment for these offences has in the recent past at any rate been more obviously retributive than in most other areas of criminal law: it has marked the revulsion of the so-called normal person against unnatural vice! Again, nowhere is the importance of reformative treatment more obvious, and nowhere is it more clear, at present at any rate, that there is somewhere a point beyond which reformative treatment cannot go. Preventive imprisonment and deterrent punishment, as to the justification of which there has been so much discussion of recent years, are clearly very relevant issues in homosexual crime, and equally call for much more expert practical research than they have so far received. It is so easy, and unfruitful, to argue these matters in the light of one's subjective predelictions, and without any real knowledge of the practical problems involved. These punishment questions have clearly been continuously in the minds of all the authors whose essays go to make this book.

Turning more in detail to the contents of this volume, the strictly legal aspects of this subject fall, as I have said, within a somewhat narrow compass. They are touched upon to a greater or lesser extent in all the essays and particularly in the first two which are by His Honour Judge Tudor Rees and Lord Hailsham, Q.C. respectively. Unfortunately, these two essays are

the weakest in the book. Judge Tudor Rees presents a sad spectacle of confusion. A conservative lawyer of orthodox religious outlook, yet obviously a man of deep humanity, he has been confronted as a Chairman of a busy court of quarter sessions with the problem of dealing with a continuous stream of homosexual offenders. His short essay is in effect a confession of his inability, under the law as it stands, to deal with them in any satisfactory way: yet it is not at all clear that he wants to see it altered. In his experience the "large majority of the offenders" are men of "good education and refinement, often if not usually the hapless victims of an overmastering passion," which the fear of punishment cannot subdue, yet he seems usually to have decided that the only thing to do was to send them to prison for substantial sentences. This brings him to an aspect of the punishment problem which is touched upon elsewhere in the volume, but in this essay dismissed altogether too cursorily. Should there be special prisons for homosexuals? Can they safely be sent to ordinary prisons? Professor Kinsey has shown that in the U.S.A., at any rate prisons are apt to be hotbeds of homosexual vice, and Dr. Neustatter who contributes the medical chapter to this book, while admitting that occasionally prison may be a means of ensuring psychiatrical treatment for a homosexual who would be too feckless to go through with it in ordinary life, also emphasises the danger of sending homosexuals to general prisons. This is a subject which obviously requires much more thought and research than it has so far received.

Much of the judge's argument seems to me to be inconsistent. Thus after describing a number of cases in which the offender had acted under a compelling emotional drive, and stressing their pathetic character, he dismisses the defence of uncontrollable impulse as quite unacceptable with the well-known remark of Avory J. that "an irresistible impulse is an impulse which must be resisted," a view which Dr. Neustatter later in the volume describes as "trite, taking the matter no further."

Judge Tudor Rees gives us the picture of a man trying to make up his mind on a difficult subject, and finally deciding frankly to leave his perplexities with his readers. Lord Hailsham has no such doubts. He is concerned with much the same problems, for the reform of the criminal law is essentially a social matter. But Lord Hailsham does not take kindly to the idea of reform, at any rate in respect of this branch of the law. His view appears to be that there is little if any difference between this branch of the criminal law and any other. He is satisfied that if the law were relaxed there would be a substantial increase in homosexual vice, and he sees the problem almost entirely as one of the protection of young boys. So conservative is his approach that, alone among his fellow authors, he is prepared to defend the existing difference in the law as between men and women, arguing that there is an essential difference between lesbianism and male homosexuality.

Several of the more dogmatic statements made by Lord Hailsham seem to me to be very questionable, and it is a pity that he did not have the advantage of studying some of the other essays in this volume before completing his own. Thus his view that all homosexuals are incurable is certainly not generally accepted by psychiatrists. It is true that the complete inverts appear on present medical knowledge to be quite hopeless, but they are a small fraction of the whole, according to Kinsey not more than 5 per cent. The others present a greater or lesser problem according to which of the various psychic groups they fall into. Some psycho-analysts claim substantial success, and Dr. Neustatter makes it clear that there is considerable difference of opinion in the profession upon this matter. Again claims have been made that a number of cases have been successfully treated with hormones, and some doctors believe that there are good prospects in this direction for a certain type of case. Lord Hailsham bases his argument in favour of leaving the law as it stands on a theory that homosexual practices occur almost entirely among juveniles, or between adults and juveniles. This is a very

common view, but the evidence in support of it comes almost entirely from the record of court convictions, which are of course more likely to affect this sort of people than consenting adults who from the nature of things are not very often charged with the offence. According to the evidence presented to the departmental committee by the Institute for the Study and Treatment of Delinquency and the Portman Clinic the adult homosexual on the whole prefers an adult partner. The cases on which this evidence was based were only as to a fraction referred to the Clinic after conviction by criminal courts and thus provide a rather more satisfactory type of evidence than that based upon the police court cases, and throw serious doubt upon Lord Hailsham's strongest arguments.

The Rev. D. S. Bailey's essay on "Homosexuality and Christian Morals" is an exceptionally sensitive and well-argued contribution which cannot fail to impress the reader, even if he does not accept the theological basis from which Dr. Bailey argues; and it is of special value to have this theological basis so lucidly set forth. After a few pertinent observations on the legal aspects of the matter the author concludes that "attempts to suppress such practices by law may be little more than efforts to cure symptoms while neglecting the disease itself."

Dr. Neustatter, who is a distinguished psychiatrist, contributes an essay written in clear non-technical language which will be of great value to everyone wishing to understand the medical aspects of the problem. To one lawyer at any rate it brought home the fact that our tools of trade are still largely medieval in character. Our criminal law has never got beyond the most rudimentary psychological concepts and as a profession we remain untouched by the vast scientific discoveries in the field of mental phenomena which have been so noteworthy during the past century. Dr. Neustatter's approach is well balanced. He makes no extravagent claims that this branch of human affairs should be taken over from the lawyers by the doctors, nor that the doctors themselves have got far along the road to a successful solution of the problem. Nevertheless his criticisms of the existing law and its inevitable unequal enforcement are acute and well directed: his own proposal is for compulsory medical detention in proper cases. But in regard to male consenting adult offenders he ranges himself with those who think that they should be put outside the sanction of the criminal law.

Dr. Neustatter is a psychiatrist and naturally concentrates on the psychological side of the problem. Recent anatomical researches, however, suggest that an appreciable proportion of these cases are genuine hermaphrodites, though it may require careful medical diagnosis to establish this fact. Individuals who appear to be men may in fact be women and may be made so physically by surgical operation. The anatomical side should not be overlooked therefore, introducing as it does another important element.

Dr. Hammelmann in his interesting comparative summary of the law relating to this matter in other western European countries shows that beginning with France under Napoleon there has been a marked trend towards the liberalisation of the law. England and Western Germany are the only countries apparently untouched by this movement, which has indeed spread to the U.S.A. where New York State recently brought its law into conformity with that of the majority of modern States. The developments in Scandinavia are of particular interest, since it is those countries which have shown the greatest social consciousness of the problems of criminal responsibility in recent years.

Dr. Hammelmann's researches bring out some important points which are very relevant to the discussions now going on in England. The first is that the liberalisation of the law in continental countries has been carried through "slowly, carefully and deliberately," not, as is often said here, with reckless disregard of the consequences. Nor as far as one can judge has it been followed by an increase in homosexual vice; indeed careful observers have contended that these practices are more common in the countries which have

the severest repressive legislation. Again, the countries in question have not weakened their legislation against sexual interference with juveniles, indeed much of this legislation is stronger than ours (*e.g.*, Sweden). Dr. Hammelmann's conclusion is that we have not yet got the material for an "adequate penal policy . . . what is required to any fruitful discussion of this topic is not more opinions but more facts"—Lord Hailsham please take note.

C.

MENS REA IN STATUTORY OFFENCES. By J. Ll. EDWARDS, M.A., LL.B., PH.D. [London: Macmillan & Co. Ltd. 1955. 21s. net.]

DR. Edwards' special interest in the topic of mens rea in statutory offences has been made apparent on a number of occasions by his articles in the *Modern Law Review* and in *Current Legal Problems*. In this excellent monograph, the eighth volume in the *English Studies in Criminal Science* series, the author expands and develops his earlier consideration of particular matters in this field to present a valuable examination of a very difficult subject.

The direct creation of criminal offences as a means of implementing social and economic policy is a familiar activity of the modern legislature. The number and diversity of these offences is in itself cause for some concern. But even more disquieting is the readiness with which Parliament, the courts and, indeed, practitioners have accepted that many of these offences presuppose a departure from the normal principles of criminal liability. With this in mind, Dr. Edwards seeks "to direct attention to the serious danger of the criminal law falling into disrepute if both the legislature and the courts allow statutory offences to be administered with scant regard for the doctrine of mens rea." It is a measure of the success of this work that the reader is left in no doubt of the existence of this danger.

The greater part of the book is devoted to a critical analysis of the varying interpretations put upon key-words constantly recurring in statutory offences—words such as "malice," "wilfully," "knowingly," "permitting," "suffering," "causing," "allowing" and "fraudulently." From the chaos of conflicting decisions (including American and Commonwealth) based on the presence or absence of many of these words, Dr. Edwards seeks to deduce such legal principles as can be found consistent with the doctrine of mens rea or, if none appear, to formulate them for himself.

In addition to this comprehensive analysis, a neat chapter is devoted to the problem of vicarious responsibility, in which the author comes down strongly in favour of the delegation theory.

In view of the general terms of Dr. Edwards' thesis, with its insistence on the need for guilty knowledge, it is somewhat surprising to discover his advocacy of the acceptance of inadvertent negligence as sufficient mens rea in certain statutory offences involving "'permitting,' 'suffering' and other similar expressions." The author reaches the conclusion that Devlin J.'s analysis in *Roper* v. *Taylor's Central Garages* (in which negligence as a degree of mens rea was rejected) "is in direct conflict with the majority of dicta dealing with offences of the very kind referred to in Roper, in which negligence has been stated to be a culpable state of mind" (p. 215). An examination of some of the dicta referred to by Dr. Edwards, however, leaves room for doubt as to the strength of this conclusion. In *Hearne* v. *Garton*, Lord Campbell's dicta were clearly *obiter*. In *Bosley* v. *Davies*, the comment of Cockburn C.J. in argument, which Dr. Edwards relies upon, was at odds with the decision in the case, as the author acknowledges. *Crabtree* v. *Hale* is equivocal: *Hardcastle* v. *Bieby* leaves the question open. *Moses* v. *Midland Ry.* required no reference to negligence at all for its decision—in which event

it would appear fully consonant with Dr. Edwards' views on "permitting" expressed earlier in his book. He admits that Avory J.'s dictum in *Goldsmith* v. *Deakin* is not necessarily referable to inadvertent negligence, and *Browning* v. *Watson* and *Carter* v. *Mace* are poor material to rely upon, particularly in view of the author's earlier reaction to such cases. The only case of strength seems to be *Houston* v. *Buchanan*, and this has not passed without criticism. The statutory proviso cases cannot support any general principle of liability, for in those instances the legislature has expressly (and exceptionally) made negligence culpable. In view of the many cases in addition to Roper's which have rejected negligence as a degree of mens rea in statutory offences, one would not have expected so positive a conclusion to the contrary on the part of the author.

Throughout the book as a whole Dr. Edwards is faced with decisions which appear to conflict with the true principle as he expounds it—conflicts being inevitable in the development of this portion of the law. (Part of the value of this book is that there should be fewer of these decisions as a result of its use.) Where such decisions are met, they are generally accepted as being wrongly decided, although occasionally a valiant effort is made—a striking example is *Browning* v. *Watson*—to reconcile the irreconcilable. Certain cases, perhaps, deserve more than the treatment given them: *Larsonneur*, for example, has only a footnote reference of a cryptic, if appropriately condemnatory, nature.

There are a few errors and misprints: the omission of "no" from the second sentence in the quotation from Parke B.'s judgment in *Prestney* produces a misleading *non sequitur* (p. 6); *inter alia* becomes one word on p. 207: and the reader will search in vain for reference to *Shave* v. *Rosner* on p. 110, although the index of cases guides him there.

There may be others, but these are minor matters—this monograph is a first class piece of work, filling a great need. It should be on the shelves of every academic or practising lawyer.

William E. Denny.

The Law of Civil Injuries. By Hamish R. Gray, Lecturer in Law, University of Nottingham. [London: Hutchinson's University Library. 1955. 191 pp. 8s. 6d. net.]

This is a short book on the law of torts, aimed primarily at the general reader. It should be of use also to the student who wishes to gain a bird's-eye view of the subject before coming to closer grips with it. In 191 pages there is obviously no room for academic controversy, but there is a clear and readable account of the subject. The author has fortunately resisted the temptation of crowding too much material into the book: rules are not merely stated but freely illustrated with summaries of the better known leading cases.

It is with no wish of detracting from the author's achievement in these respects that a few criticisms on points of detail are advanced. (1) At p. 7 it is said that "there is no unlawful act without a remedy" and at p. 8 breaches of contract are described as unlawful acts. Unenforceable contracts appear to be ignored. (2) The statement at p. 39 that, apart from contract, there is no duty to avoid negligent misstatements should have been qualified by a cross-reference to the exceptional cases discussed at pp. 107–110. (3) The heading at p. 46 "Liability Of Occupiers: Intention Irrelevant," is misleading so far as liability to trespassers, which is discussed under this heading, is concerned. (4) While it is difficult in a book of this size to criticise omissions, surely *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880 should have been mentioned in the section on nuisance. (5) So, too, the general reader cannot be expected to know the legal effect of the distinction between

cats and dogs, and may well be misled by the failure at p. 72 to refer to the Dogs Act, 1906. (6) The discussion of the Crown as a party to an action in tort (pp. 134–136) is one of the few badly balanced parts of the book. The Crown Proceedings Act, 1947, is dismissed in two sentences, in the course of which liability for breach of statutory duty is not even mentioned. It is further assumed, without authority or argument, that "property" in section 2 (1) (*c*) of the Act means "land." This is followed by a full discussion of *Ellis* v. *Home Office* [1953] 2 Q.B. 135, which is only indirectly relevant to the law of torts. (7) It is doubtful whether the torts of a corporation are "*invariably* those of its servants or agents" (p. 141). Thus recently in *Carmarthenshire C.C.* v. *Lewis* [1955] A.C. 549 the House of Lords held the defendant council liable while negativing negligence on the part of its servant. Again, a corporation might be held liable, *e.g.*, for failure to warn its licensees even though the duty to warn did not lie on any particular servant or agent. (8) The statement at p. 148 that "the principal is liable for his agent's fraud only when the agent himself is also liable" is inconsistent with the *Berkeley Property Case* [1936] 2 All E.R. 1039. (9) The "rescue cases" are said to depend on an "obligation to intervene" (at p. 162). After *Hyett* v. *G. W. Ry.* [1945] 1 K.B. 345 it is better to say that they depend on the reasonableness of the intervention.

G. H. Treitel.

The Transfer of Chattels in the Conflict of Laws. By Pierre A. Lalive. [Oxford: Clarendon Press. 1955. xix and 200 pp. 30s. net.]

Monographs on a topic of the conflict of laws are few and far between. It gives particular pleasure, therefore, to welcome this addition to a short list. It was written by a Swiss lawyer as his dissertation for the degree of Doctor of Philosophy of the University of Cambridge. As Dr. Morris emphasises in the Foreword, it has grown into a book which on account of its scholarly character without doubt constitutes an enrichment of the private international lawyer's equipment.

In his first chapter dealing with the question of classification the author supports the generally accepted principle that property is to be classified according to the *lex situs*. (Incidentally, his discussion of the well-known German case in RGZ 145,85 is unsatisfactory, because he overlooks that this was a case of *renvoi* and the Supreme Court, therefore, correctly classified according to the foreign legal system which included the *renvoi*.) There follows a long and somewhat elaborate discussion which accounts for more than one-third of the book (pp. 34–115) and is designed to show the inadequacy of the *lex domicilii* and the *lex actus* and the supremacy of the *lex situs* both as an established legal rule and as a rationally attractive solution. The discussion of the *lex actus* theory should be read in conjunction with a later chapter on the distinction between the transfer and the contract to transfer (pp. 130–144); it may well be that the author, like Dr. Morris (who, after all, has advocated a theory of the proper law of the tort), ought to have been less dogmatic in dealing with the influence of the law of the contract upon the transfer of title.

In his next chapter on the meaning and the domain of the *lex situs* the author favours the principle that capacity to assign and acquire chattels like the essential and formal validity of the transfer must be determined by the law of the situs. The last chapter relates to the problem of the change of situs. Again a certain conceptualist approach is noticeable. Thus to reject a suggestion on the ground that it "amounts to a negation of the rule of the *lex situs*" (p. 152) is perhaps not a conclusive reason.

The book contains some surprising omissions. Although *Slatford's Case* [1953] 1 Q.B. 248 is referred to, Devlin J.'s suggestive dictum "that generally property in England is subject to English law and to none other" is ignored. The important subject of confiscation has been almost completely neglected. The effect of public policy and international delinquencies ought to have been closely considered in a work of this type. Nor would it have been wholly out of place if some attention had been given to the problem of possession. Pages 84–87 seem to contemplate express trusts only, but in numerous other cases the conception of beneficial ownership leads to difficulties of great practical importance.

However, a strong dose of originality is not necessarily a virtue. It is the soundness of Dr. Lalive's argumentation, the skilful treatment of comparative material, the concise yet careful discussion of the available authorities and the principal problems that private international lawyers will come to appreciate. It is to be hoped that Dr. Lalive's first contribution to English legal literature will not be his last.

F. A. Mann.

Constitutional Law. By E. C. S. Wade, m.a., ll.d., and G. Godfrey Phillips, c.b.e., m.a., ll.m. Fifth edition by E. C. S. Wade. [London: Longmans Green & Co. 1955. xxx and 538 pp. 35s. net.]

Wade and Phillips, having reached its middle twenties, has now become set in its ways. No major alterations have been made since the 1950 edition. There are a few changes in the selection and arrangement of material; all have been well considered. Most of the important recent cases and statutes have been incorporated in the text, but there are some surprising omissions —*MacCormick* v. *Lord Advocate*, *Rivlin* v. *Bilainkin*, *R.* v. *Metropolitan Police Commissioner, ex p. Parker, ex p. Fry*, *Broome* v. *Broome*, and the Wireless Telegraphy (Validation of Charges) Act, 1954 (which was the sequel to the remarkable case of *Davey Paxman & Co.* v. *Post Office*, reported in *The Times*, November 16, 1954). Presumably these have been excluded by the learned editor in pursuance of his declared policy of passing over some matters of topical interest.

It is arguable that 500 pages is long enough for any students' textbook. I am nevertheless persuaded that *Wade and Phillips* is too short. It is a masterpiece of compressed writing on an amorphous and sprawling subject, and it is admirably arranged and proportioned. But it is rather too highly concentrated for the average student, who is often a first-year student and who relies so heavily on his textbook. The better student and his teachers would welcome fuller documentation and a more thorough analysis of basic legal problems. For example, a great deal has been written in learned periodicals during the last few years on the meaning of the legal concept of parliamentary sovereignty. Traditional interpretations have been attacked at their foundations. It has been asserted that Parliament may, by redefining itself or by prescribing a new legislative procedure, legally bind itself to legislate in a new manner. One may well attempt to repel the assaults on the citadel (see Mr. H. W. R. Wade's article in the November 1955 issue of the *Cambridge Law Journal*), but it is difficult to see how one may justifiably ignore them. Yet the cursory treatment of the problem in the 1950 edition is repeated in 1955. In making this general comment I am mindful of the debt which scores of teachers and thousands of students owe to an outstanding book.

On matters of detail, the following points are noted. Mr. Robert Blake's *The Unknown Prime Minister* indicates that the choice of Baldwin as Prime

Minister in 1923 in preference to Lord Curzon is a weak precedent for the proposition that a peer cannot be Prime Minister. Lord Halifax's attitude to the problem (p. 63) in 1940 may well have been influenced by the pregnant silence of Mr. Churchill. A passage at pp. 63–64 might be misunderstood to mean that the Sovereign could not refuse a request for dissolution without being obliged to dismiss the Prime Minister. In note 1 at p. 79, "legislature" should read "legislation." The Triennial Act, 1694, is now the Meeting of Parliament Act (Statute Law Revision Act, 1948, Sched. II). In the sidenote at p. 108, "King's" should read "Queen's." Although the House of Commons cannot commit a person to prison for a fixed term extending beyond prorogation, it may be competent to commit for a fixed term subject to the implied condition that the imprisonment will be terminated by prorogation (p. 125). At p. 131 the Republic of Ireland is referred to as if it had still been part of the Commonwealth in 1952. Although the recent changes in the royal titles are discussed, the new form of title in United Kingdom law is not set out (p. 132). The Coronation Oath was again varied in 1953 without statutory authority (p. 133). In note 1 at p. 192, "1945" should read "1955." The proprietary disabilities of aliens might be stated more exactly, and it is not quite correct to say that an alien cannot hold a public office (p. 199); and see now the Aliens' Employment Act, 1955, which received the Royal Assent after the present edition was published. In the sidenote at p. 224, "States" should read "Status."

In Chapter 11 of Part IV, it would be helpful to have a tabulated statement of the rules governing ministerial responsibility to Parliament for the nationalised industries. One superior judge, Sir Jonah Barrington, has been removed from office under the procedure introduced by the Act of Settlement (p. 250). The passage on statutory remedies at p. 303 is difficult to follow; the learned editor might perhaps amplify his account. The decision in *Franklin* v. *Minister of Town and Country Planning* is criticised, partly on the ground that it is inconsistent with the Housing Act cases (pp. 314–315). Commentators on this case are divided into two camps; I take the view that the decision was a sensible one, but agree that the terminology used by Lord Thankerton in justifying the decision was in some respects unfortunate.

At p. 364 "goaler" should read "gaoler." The term "colonial protectorate" (pp. 443, 445) is no longer used in Commonwealth relations. Drafting amendments have sometimes been made in the United Kingdom (p. 447) to Canadian proposals for the amendment of the British North America Acts (Gérin-Lajoie, *Constitutional Amendment in Canada*). For the amendment of the constitutions of the Australian States, United Kingdom legislation is not, in general, required (p. 447, n. 2). In Canada the Senate now has 102 members, not 96, and the House of Commons 265 members, not 255 (p. 452). It is by no means clear that a Governor-General could not properly dismiss a Prime Minister who was deliberately engaging in a course of illegal conduct (p. 455). There are forty placita in section 51 of the Australian Constitution (pp. 457–458). The full external prerogatives of the Crown were delegated to the Governor-General of Canada by the Letters Patent of 1947 (pp. 472, 474).

S. A. de Smith.

Scrutton on Charterparties and Bills of Lading. Sixteenth edition. By Sir W. L. McNair and Alan A. Mocatta., q.c. [London: Sweet & Maxwell, Ltd. 1955. xcii and 658 pp. (with index). £3 10s. net.]

Since this is the first occasion upon which this well-known textbook has been reviewed in the *Modern Law Review* it may not be amiss to say something about its origin and general character by way of introduction.

When the youthful Scrutton published in 1885 his volume on the *Contract of Affreightment*, a more apposite title than that under which it has since become so generally known, he had not established himself at the bar nor had he apparently specialised particularly in problems of maritime law. Curiously enough there had appeared only a few months before a volume entitled *Carriage of Goods by Sea* by T. G. Carver who had already established a position in that class of work. The latter is an excellent textbook which is today in its ninth edition, and it speaks for the outstanding value of Scrutton's work that it from the first established its position as against Carver, and brought to its author much work at the commercial bar: indeed it may be said to have made him professionally.

Scrutton's method of presenting his material was that of short articles in which the rules of law are set out, followed up by explanatory notes and illustrated cases. This technique had first been adopted a few years earlier by Sir McKenzie Chalmers in his annotated edition of the *Bills of Exchange Act, 1882*, and it was to be much used in succeeding years. At that time the codification of commercial law was very much to the fore, and it may be that Scrutton adopted this method with the codification of the rules of the contract of affreightment in mind. Some years later his example was followed by William Bowstead in his competent if rather less successful *Digest of Agency Law*. But with the advent of the twentieth century the movement for the codification of commercial law died away, and it is hardly necessary to say that neither the contract of affreightment nor agency have ever been codified.

This type of textbook, though it is excessively tedious to read and makes it very difficult for a student to get a good general grasp of his subject, meets the requirements of practitioners admirably. Certainly they have always found Scrutton indispensable and owing to the fact that this is a branch of the law which has continued to develop there has hardly been a decade in which at least two new editions were not called for. Thus in the seven years since the publication of the fifteenth edition there have been no fewer than a hundred reported decisions which have called for noting. Sale of goods and companies are the only other commercial sectors in which there has been anything like the same growth of the law.

Nor have these cases been substantially concentrated at one or a few particular growing points, though it is true that there are two or three such points to which particular attention has had to be given. One of these is naturally the Carriage of Goods by Sea Act, 1924. Not that there have been many cases arising out of the construction of this statute, indeed the editors call attention "to the remarkable paucity of decided cases on the Act." They think that this may be due to "the good sense of underwriters and shipowners." I discussed the same matter in these pages when reviewing Mr. Colinvaux's volume on this statute ((1955) 18 M.L.R. 310) and I suggested that perhaps the reason was that this statute was not so incompetently drafted as is often thought, but it would not appear that the editors of Scrutton subscribe to this view.

However, in *Pyrene* v. *Scindia S.S. Co.* [1954] 2 Q.B. 402, Devlin J. made a number of observations on the compulsory responsibilities established by Article III of the Schedule which are of much interest and value, though not by any means all required for the decision of the case. The editors find themselves unable to agree with a number of these, but the extent to which this judgment impinges on the law as stated in the previous edition can be gauged from the fact that this case is cited no less than twenty-four times in the present table of cases. Certainly this is the most important decision which has recently been given on the 1924 Act, but quite a number of others have been come to which merit attention and are referred to in the footnotes which have been more expanded here than in any other part of the book.

The overhead expenses incurred in the manning of modern ships are so great, and the difficulty of framing precise stipulations in relation to place,

method, and particularly time, for loading and discharge so real that there is continuous litigation over demurrage, and several cases of interest have been before the court in recent years. In one of these *Alvion S.S. Co.* v. *Galban Lobo* [1955] 2 W.L.R. 543 the Court of Appeal gave a new construction to the well-known expression "weather working day" in which they departed from the unsatisfactory construction given to this term by Lord Russell of Killowen C.J. in *Brankelow S.S. Co.* v. *Lamport & Holt* [1897] 1 Q.B. 570, which it is stated had not in fact been followed in the trade.

Another point over which there has been a good deal of controversy of recent years relates to conflict of laws. International carriage naturally gives rise to situations in which disputes as to what is the proper law of the contract are likely to occur. Scrutton was a strong exponent of the law of the ship's flag (*Lloyd* v. *Guibert* (1865) L.R. 1 Q.B. 115) but as Carver says "the courts have not in practice been much influenced by this rule," and certainly in the more modern cases it has only been one of several factors to which attention has been paid (*cf.* the *Njegos* [1936] P. 90). Successive editors have had to retreat gradually from the position contended for by Scrutton, but recently the Court of Appeal actually applied the ship's flag rule (the *Assunzione* [1954] P. 150) and the editors have found it necessary to recast their statement of the law to reconcile it with this decision (Article 7). The result is certainly somewhat confusing, and does give point to the value of some simple and easily applied rule such as that of the ship's flag.

It goes without saying that the editors have noted up all the recent cases, and have studied their impingement upon the law as previously stated with the care and accuracy one would expect from them. The *Pyrene* case already referred to is an excellent illustration of the scholarly editing: it has in particular entailed a number of new notes to the Carriage of Goods by Sea Act, 1924. When a statute has been so little before the courts as this comments on possible constructions coming from such an authoritative source as the editors of Scrutton, particularly when they have been stimulated by the *obiter dicta* of Devlin J., are naturally of the greatest value to all students of the subject, and especially to practitioners, underwriters and shipping managers.

There is one inelegance which has been carried forward from one edition to another for some time past and which I personally would like to see removed. I have already mentioned that the scheme of the work is to follow the statement of the legal rule by explanatory notes and illustrations from the cases. But there are a number of instances where the illustrations precede the explanatory rules, and at least one (see Article 29) where the illustrations are sandwiched between two sets of notes. This is no doubt a small blemish but it might well be removed.

C.

Lowndes & Rudolf on General Average and the York-Antwerp Rules. Eighth edition by J. F. Donaldson, Barrister-at-Law, and C. T. Ellis, Average Adjuster. [London: Stevens & Sons, Ltd. 1955. xxii and 600 pp. (with index). £5 5s. net.]

In the seventh edition of Lowndes on *General Average* there was incorporated Mr. Rudolf's almost equally well-known volume on the *York-Antwerp Rules relating to the Adjustment of General Average.* This useful amalgamation took place in 1949 under the joint editorship of Mr. Rudolf and His Honour Judge Hodgson, then practising at the commercial bar: the edition was reviewed in (1949) 12 M.L.R. 405. Unfortunately it appeared only shortly before the new 1950 edition of the York-Antwerp Rules was published; since these made a number of important emendations of the then existing 1924

set of Rules the new Lowndes & Rudolf became semi-obsolete almost at once, and the chief change in the new edition is the incorporation of the new set of Rules.

This edition has been entrusted to a new editorial team, and we are glad to note that the combination of lawyer and average adjuster has been preserved. Litigation arising from general average has nearly become a thing of the past; the reason is that the problems which arise are almost invariably so authoritatively handled by the average adjusters concerned that recourse to the courts is unnecessary. The participation of an average adjuster in the editorial work is therefore in a sense more important than that of a lawyer.

Although apart from the 1950 version of the Rules there was very little new material to incorporate in this edition—the number of cases on the subject decided since 1949 could be counted on the fingers of one hand—the editors have not been idle. They have recast most of the chapters to a greater or less extent; they have succeeded in cutting out some dead wood; and they have brought some of the material out of the Appendices into the main text, notably the chapter on the law in the U. S. A. This work has on the whole been done judiciously and the result is a much improved volume to which the better paper and improved layout contribute materially. Occasionally I have felt that the material in Lowndes was shifted about without there being an improvement in the presentation, indeed rather the reverse. There is also a tendency to use the heading "miscellaneous" for groupings of material which are not miscellaneous at all, but form an integral part of the basic law. Thus in Chapter 2 which deals with the general principles and conditions of general average we find such important topics as the necessity of eventual success of the operation, the question whether more than one interest must be imperilled, and the question whether a general average expenditure must be extraordinary in kind as well as in degree discussed under this heading, a procedure which might lead an uninitiated reader to suppose that they are not matters of any moment. Also I found myself occasionally in disagreement over the excisions. For instance whether McLachlan's views on the origin of the term "average" were or were not sound they have so often been referred to with respect, as of course by Lowndes himself, that it seems a pity that the reference to them should be dropped. These matters are not perhaps of great substance and detract but little from the general value of the alterations made.

On the other hand some of the additions, if not strictly necessary to the argument, are historically of great interest. In earlier editions of Lowndes *Mouse's Case* (1609) 12 Co.Rep. 63 was given as the first reported case in which the law of general average contribution was discussed. The editors are now able to quote a case decided in 1285, and published by the Selden Society some years ago.

The important changes in the York-Antwerp Rules introduced in the 1950 edition have necessitated a good deal of reorganisation. The rather elaborate discussion of the foreign law which was very much cut down in the last edition has now in effect disappeared, apart from the special chapter on American Law. This change was made possible by the substitution in the 1924 Rules of a lettered code for Rule XVIII of the 1890 Rules, and the process was carried a stage further in 1950 by prefacing the lettered code by a new rule of interpretation. This has enabled a considerable simplification to be effected.

At the same time the editors have divided their commentary on each rule into two parts, "historical development and practice," and "construction," which makes for clarity. The fusing of Rudolf with Lowndes which we said we would like to see take place when we reviewed the 1949 edition has not been carried through, but there are now included in the text of Lowndes

appropriate references to the rules, as in Chapter 2, and much useful cross-referencing has been carried out. The authors do also make a number of suggestions as to the proper construction of some of the rules; a procedure on which they are to be congratulated, for decided cases on the rules are so few that it is seldom possible to cite a judicial decision in respect of a disputed point of construction.

C.

THE LAW. By J. LEIGH MELLOR. [London: The Teach Yourself Books: English Universities Press. 1955. xii and 234 pp. 6s. net.]

AFTER *Teach Yourself Anthropology, Teach Yourself Astronomy, Teach Yourself Ethics,* and a number of other such titles, we now have been given *Teach Yourself the Law.* Law teachers need not be alarmed since this book will not put them out of business and indeed will help them in their work, being of use not only to the layman who wishes to glean some rudimentary knowledge of the legal system under which he lives, but also to those embarking on a course of legal study who wish to gain a preliminary bird's-eye view of their subject. After a brief outline of the history of the English law the book goes on to deal with individual topics such as constitutional law, the law of torts, contract, real property, matrimonial causes, the criminal law, and ends up with a brief outline of the composition and means of entry to the legal profession. At times the scholarship is a trifle slipshod. Thus on p. 12 we are told that "many of the early Chancellors were ecclesiastics," whereas they were ecclesiastics almost without exception until the sixteenth century when a layman, Sir Thomas More, sat on the woolsack. On p. 159 *mens rea* is defined as the "intention to do the criminal act," and no mention is made of "recklessness" which also constitutes *men rea.* On p. 164 the author states that "if a crime requires *mens rea* then the master is not liable for the servant's crimes committed during his employment unless the master himself has the necessary *mens rea.*" He qualifies this by a reference to statutory crimes but makes no reference to the crimes of public nuisance or newspaper libel, both crimes of vicarious liability and both of which require *mens rea* in the servant. A further criticism of the book is that sometimes technical terms are not sufficiently explained. Thus on p. 121 references are made to legacies "adeeming" and "abating," but no explanation of the meaning is given of terms which would puzzle most laymen. The account of legal aid, of great importance to potential clients, is sketchily treated. These are however minor criticisms and on the whole the author is to be congratulated on the clarity and readability of his book and on the skill with which he has condensed much information about the law into a small space.

NORMAN ST. JOHN-STEVAS.

INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1954–1955. [Sijthoff: Leyden; H.M.S.O.: London. 1955. 272 pp.]

FROM the point of view of English lawyers the most interesting feature of the ninth volume of the *Yearbook* of the World Court is the reference to the retirement of Lord McNair and the election of Sir Hersch Lauterpacht as a judge. The short biographical note on Judge Lauterpacht reminds us that it is almost thirty years since Sir Hersch produced his first major work in international law, *Private Law Sources and Analogies of International Law,* 1927, and twenty years since he first edited Oppenheim (fifth edition 1935).

Each volume of the *Yearbook* reproduces the Court's General List enabling one to ascertain the popularity and intensity of occupation of the Court from year to year. The first dispute was referred to the Court in 1947 and judgments were delivered in 1948 and 1949. In 1947 the Court was also asked for an advisory opinion which was rendered in 1948. The sole submission of 1948 was an application for an advisory opinion rendered in 1949. 1949 saw the registration of two disputes and of three requests for advisory opinions. The latter were all delivered in 1950, together with the first judgment in the *Asylum Case*. The other two judgments in this case were delivered in 1951, as was the judgment in the *Fisheries Case,* the other dispute registered in 1949. In 1950 one judgment and one advisory opinion were asked for and delivered in 1952 and 1951 respectively. The latter year saw four contentious cases submitted to the Court, but no requests for advisory opinions. Two of the judgments were delivered the following year, and the others not until 1953. No issues were referred to the Court in 1952, although in 1953 there was one contentious case submitted and one request for an advisory opinion, both of which were dealt with in 1954. In 1954 the only matter of importance was a request for an advisory opinion which was delivered in 1955. It is clear from the above that, as yet, neither States nor international institutions make enough use of the Court.

The other parts of the *Yearbook* which are of greatest interest are the sections devoted to instruments conferring jurisdiction upon the Court and the bibliography, both of which constitute valuable reference material for foreign offices and students alike.

L. C. Green.

The Solicitor's Guide to Development and Planning. By R. N. D. Hamilton. Second edition. [London: The Solicitors' Law Stationery Society Ltd. 1955. xv and 181 and 11 pp. 22s. 6d. net.]

An Outline of Planning Law. By Desmond Heap. Second edition. [London: Sweet & Maxwell, Ltd. 1955. xxxvi and 203 and 5 pp. 25s. net.]

The Town and Country Planning Act, 1954. By Desmond Heap. [London: Sweet & Maxwell, Ltd. 1955. xv and 215 and 17 pp. 30s. net.]

Planning Compensation Valuations under the Town and Country Planning Act, 1954. By W. F. Oliver and K. F. Goodfellow. [London: Sweet & Maxwell, Ltd. 1955. xv and 308 and 18 pp. 37s. 6d. net.]

The Town and Country Planning Act, 1954, which came into force on January 1, 1955, radically reorganised the financial provisions contained in Part VI of the Act of 1947, by abolishing the development charge and substituting a system of payment of compensation on certain refusals of leave to develop land. This has involved the overhaul of the existing textbooks on the legal aspects of town and country planning and the associated question of compensation for the compulsory acquisition of land, and created a need for a series of new books dealing with the problems introduced by the new system of compensation.

The Solicitor's Guide to Development and Planning is the second edition of an admirable attempt to reduce the complexities of the relevant Acts into everyday language. Its origin in an "Oyez" practice note and articles in

the *Solicitors' Journal* can clearly be seen from this book's practical bias—*e.g.*, the instruction regarding purchase notices on p. 142 and the helpful information regarding the actual conduct of planning appeals (pp. 47–49). A valuable feature of this book is the chapter on those aspects of conveyancing practice which are affected by planning considerations.

The second edition of Heap's *Outline of Planning Law* makes fewer concessions to the newcomer to this field with its highly technical phraseology. This book is, however, by one of the acknowledged experts in this field and on the legal aspects of "pure" planning (for this author is not concerned with conveyancing) its comprehensive character marks it out as the standard textbook on this subject. The new chapters (12, 13 and 15) on the financial provisions of the 1954 Act are first class once the reader has learned the language, the difficulty of which is, however, no fault of the author, but that of the responsible Parliamentary draftsman.

A companion volume to the *Outline of Planning Law* is the same author's annotated version of the 1954 Act itself. Basically this is the version of the Act originally published with the *Current Law Statutes*, to the user of which this book needs no recommendation. It includes also the text of the various regulations made consequent upon the passing of the Act, and (most valuable) an index to the Act and regulations. The notes are brief and explanatory rather than expository, assuming as they do that the reader has read and comprehended the section.

Oliver and Goodfellow's *Planning Compensation Valuations* is also essentially an annotated version of the Act (with accompanying regulations), but is written primarily for the valuer who has to translate the complicated provisions of the 1954 Act into terms of cash. The most prominent and important feature is therefore a large number of worked-out examples, which demonstrate the problems of this Act as they will appear to him. This reviewer does not, however, feel qualified to pronounce upon the merits of this part of the book and can judge the book fairly, only from the lawyer's point of view.

Here it must be said that the book seems inadequate. The notes on the sections seek actually to expound their meaning, but all too often turn out to be mere repetitions in larger type of the section commented upon (s. 8 (2)) or a paraphrase which adds nothing to the terms of the Act already printed (ss. 23, 24, 48). It may be, of course, that the object of this is to assist the valuer who may be unfamiliar with legal technicalia. If this be so, however, what is this valuer to make of the obscure note to section 38 (4) relating to the General Development Order, 1950; or the note to the definition of "tenancy" (s. 69 (1)) which is unnecessary to the lawyer and meaningless to the non-lawyer, or the long (anonymous) quotation from the Companies Act, 1948, on pp. 185–186? Even a lawyer would have difficulty over the first paragraph of explanation to section 2 (6). On the other hand section 35 (which relates to *ex gratia* payments on compulsory purchase where there has been *no* established claim under Part VI of the 1947 Act) would seem to the reviewer to require explanation, but in fact it has none except the statement: "this is the 'Pilgrim section.'" This sort of thing makes the subject unnecessarily difficult.

It is suggested that the learned authors have lost sight of their avowed reader. The law of planning can be made comprehensible to the person who is not an expert in the field, because Mr. Hamilton's book has demonstrated the fact; and some of his explanations would (in this reviewer's opinion) be of more use to the valuer than those given by Mr. Oliver and Mr. Goodfellow. The 1954 Act is, however, a valuer's Act rather than a lawyer's in the problems it raises, and these authors are greatly to be commended in tackling the interpretation of the Act from the point of view of the persons who will be most affected by it; any criticisms must therefore be considered in the light of their substantial achievement.

Hamish R. Gray.

THE DEATH DUTIES. Twelfth edition. By ROBERT DYMOND, formerly Deputy Controller of the Estate Duty Office, and REGINALD K. JOHNS, LL.B., of the Estate Duty Office. [London: Solicitors' Law Stationery Society, Ltd. 1955. cviii and 1040 and (index) 60 pp. 95s. net.]

THE eleventh edition of Dymond (reviewed in Vol. 14 of this Review, at p. 532) appeared in February, 1951. A new edition, published almost exactly four years later, is justified by the importance of the estate duty decisions reported during those four years and the changes made by the Finance Act, 1954.

Of the reported cases perhaps the most important are *D'Avigdor-Goldsmid* v. *C. I. R.* [1953] A.C. 347, and *Sneddon* v. *Lord Advocate* [1954] A.C. 257. Chiefly because of the *D'Avigdor-Goldsmid* decision—but also because of a welcome extension of the discussion of estate duty problems connected with pension funds—Chapter XI ("Policies and Interests provided by the Deceased"), which occupied only 14 pages in the eleventh edition, is given 42 pages of the new edition. The new Chapter XI is very helpful, and even those busy practitioners who dislike any increase in their compulsory reading will be grateful for this particular increase. The effect of *Sneddon's* case is discussed briefly and effectively in the chapter on gifts *inter vivos*.

Chapter XII ("Benefits from Companies") has been considerably recast and rewritten; and the new preliminary outline of the effect of the "controlled companies" provisions in the Finance Act, 1940, should be particularly helpful to anyone who, for the first (but not the unhappiest!) time, has to consider the provisions once described by Lord Simonds as "of unrivalled complexity and difficulty and couched in language so tortuous and obscure that I am tempted to reject them as meaningless" (*St. Aubyn* v. *Att.-Gen.* [1952] A.C. 15 at 30).

This book is so well produced and printed on such excellent paper that at least one practitioner wonders whether the publishers have fairly considered the possibility of producing a book such as this (of which new editions appear with unhappy frequency) less luxuriously and therefore less expensively.

The twelfth edition of Dymond is the last with which Mr. Robert Dymond himself will be actively associated. It is, surely, the best edition of this classic work; and, while it is sad that the original author should now announce his retirement, his achievement in producing a work of such massive and established authority is happily testified by the quality and success of the latest edition.

LEOLIN PRICE.

ESTATE DUTY ON SETTLED PROPERTY AND ANNUITIES. By GEORGE C. MASON, B.A. [London: Jordan & Sons, Ltd., Shaw & Sons, Ltd. 1955. xxx and 226 and (index) 12 pp. 30s. net.]

THIS is a convenient and useful book. It collects together those parts of estate duty law which concern settled property and annuities. The matter is well organised. (But some of the sub-headings under which the author presents his well-classified materials are unusual and, I think, unhappy. For example, in the chapter "Property passing on death" the following sub-headings (among others) appear: "Passing of Life Estates and Life Estates subject to Annuities"; "Passing of Income Interests"; "Group Passings and Passing of Accumulations and Discretionary Trusts." In his second edition, the author should surely reconsider and revise these inappropriate sub-headings.) The author helpfully sets out the relevant statutory provisions, in heavy type, in the text together with digests of the cases and very full discussion, including extracts from the reports, of the principal judicial decisions. The result

is a connected account of the law which can be read through without the constant and annoying interruptions which are inevitable in using other works which set out the statutory provisions in an inaccessible appendix.

Leolin Price.

Blundell's Rent Restrictions Cases. Third edition. By Lionel A. Blundell, ll.m. and V. G. Wellings, m.a. [London: Sweet & Maxwell, Ltd. 1955. £2 10s. net.]

This is an indispensable weapon in the armoury of anyone engaged in the intricate warfare for which the Rent Acts so often provide the *casus belli*. The book and its first supplement provide a comprehensive collection of 1,215 cases, digested in masterly fashion and expertly annotated. The practitioner who attempts to deal with Rent Acts problems without consulting this book must either be prodigiously learned or waste a lot of his time.

Leolin Price.

The Rent Acts. By R. E. Megarry. Eighth edition by Ashley Bramall and Paul Baker. [London: Sweet & Maxwell, Ltd. 1955. lxxxiv and 790 and 26 pp. £2 15s. net.]

This is the eighth edition of a book which has established itself in the last ten years as the accepted work of authority on the Rent Restriction Acts, and the first which (owing to other calls upon the author) has been produced at the hands of editors.

This new edition was necessitated by the Landlord and Tenant legislation of 1954, and the most substantial part of the new material (25 pp.) inevitably consists of a discussion of the "repairs" and "services" increases in rent authorised by the Housing Repairs and Rents Act, 1954. The provisions of the Landlord and Tenant Act, 1954, whereby long leases at ground rents may be transformed into "statutory tenancies," have been dealt with more briefly, since they are of course much more restricted in their application.

The editors have been faced with the thankless task of casting into palatable form the somewhat repellent contents of two complicated Acts of Parliament with attendant rules, as yet largely without the benefit of judicial interpretation. Accordingly it is no adverse criticism of them to say that this reviewer misses the master's personal touch. The mantle of Elijah is not, it seems, transmissible by disposition *inter vivos*

Hamish R. Gray.

Annales Universitatis Mariae Curie-Sklodowska. Section G: Ius. Vol. 1. [Lublin: at the University Press. 1954. 402 pp.]

This publication of the Polish State University in Lublin contains a number of papers written by members of the Faculty of Law. They are uneven in quality and degree of political colouring. Two articles, in particular, deserve being brought to the notice of readers in this country. In the first Professor A. Burda examines the method and general character of the work of J.-J. Rousseau from the materialistic viewpoint. His conclusions are not surprising. The philosopher from Geneva was very much the product of his age, both in the method he used and the ends he desired.

Plekhanov's assertion that he was a precursor of Marxism cannot be taken seriously. The writer makes short work of Rousseau's unhistorical approach, his eclecticism, his unwillingness to go all the way along the path of atheism and his idealism. Whilst Rousseau was anxious to narrow the gap between the extremes of wealth and poverty, he regarded private ownership as sacrosanct (*le vrai fondement de la société civile*) and recoiled from the idea of expropriation. He was "an ideologist of the middle class," concludes the author.

The second article, by Professor S. Buczkowski, is concerned with arbitration. It opens with a description of, as the writer puts it, the decline of the commercial courts of law in the capitalist States. Their economy is largely dominated by powerful trusts and cartels which are naturally attracted by the secrecy and flexibility offered by an arbitral hearing. The weaker contracting parties have no choice in the matter, equality in bargaining has been reduced to a purely formal principle. This, if hardly novel, is an arguable thesis, but the overall picture is distorted. The writer glosses over the judicial control of arbitration, makes no mention of the recent anti-cartel legislation in France, Norway and Western Germany and minimises other reasons which lead many litigants to opt for arbitration. He must be writing with his tongue in his cheek when he asserts wholesale that English judges in dealing with cases of restraint of trade favour the interests of monopolies. He would have been on firmer ground had he limited his strictures to the fact that the requirement of reasonableness of a restraint in the interest of the public has in this country remained largely undeveloped. Of greater interest is what the writer has to say about arbitration in Communist States. Although the Soviet Code of Civil Procedure in certain cases allows resort to arbitration in the accepted sense of the term, in practice this is never done except in the field of foreign trade disputes, for which permanent arbitration tribunals are established. The explanation, no doubt, lies in the complete nationalisation of all means of production and distribution of goods and services. (In other Communist States the continued existence of small private farmers, manufacturers and traders results in arbitration still having some, though a steadily diminishing, part to play.) On the other hand, disputes arising between the various State economic organisations, which are *ex lege* excepted from the jurisdiction of ordinary courts of law, are entrusted to the so-called State Economic Arbitration Commission. This form of arbitration bears little resemblance to the traditional institution and represents a special development of the Communist system. The Commission is not a judicial but rather an administrative organ, part and parcel of the economic machinery of the State. When dealing with disputes it is guided by the current demands of economic policy. Its award must endeavour to promote the smooth working of the plan. It is thus not surprising to learn that the Commission is not restricted in any way by parties' claims and may even act on the initiative of its chairman or, indeed, of the government.

J. K. G.

Group Problems in Crime and Punishment. By Hermann Mannheim, Reader in Criminology, London School of Economics. [The International Library of Sociology and Social Reconstruction. London: Routledge & Kegan Paul Ltd. 1955. x and 309 pp. (with index). 28s. net.]

This work is the product of an unusual combination of qualities—precise, thoughtful scholarship and a deep understanding of practical problems. It is made up of Dr. Mannheim's major articles, published over the past twenty

years (plus three previously unpublished articles), commenting on some of the leading problems in criminology, penology, and the criminal law. Contributions to legal, sociological, criminological and mental health journals and papers prepared for several international congresses reveal both the range of the author's interests and learning and the essential cohesion of his views. He describes himself as "a cross between a lawyer and a . . . sociological criminologist"—the cross-breeding has produced a blend of the better characteristics of both parents, law and sociology.

The articles collected range from the near popular to the close analysis of the methodology of social research; however, nowhere is there to be found the glib, simplistic and therefore usually wrong conclusions characteristic of so much that is written on criminology. The lawyer, interested as he should be in the study of the adult offender, in collective punishment, in the discipline of criminology and its methods, in capital punishment, in the short prison sentences and their alternatives, and in some of the more important and socially significant aspects of the criminal law, will find much of value in this book. The articles on American Prisons and American Criminology provide a useful counter-balance to the sensationalism of most of the misinformation on these topics that crosses the Atlantic.

As Dr. Mannheim points out, "whereas . . . the social worker has become accepted as an essential link in the practical administration of criminal justice, the sociologist has in this field still to fight for his recognition." It is accepted in England that the social worker has an indispensable part to play in the aftercare of prisoners, the treatment of criminals by Probation in the community, the assistance in diagnostic advice to the courts, and in many aspects of the problems of juvenile delinquency; here the skills of social case work are welcomed and their practical value recognised. The same is not true of the developing and established skills of the sociologist, who seeks to search out the complex and important group and cultural pressures without an understanding of which there can be no rational and effective penal system. It is to be hoped that this book will lead many to a recognition of the great value of this neglected approach to the problems of crime and punishment.

NORVAL MORRIS.

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D. J. P.